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Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local government may be liable under 42 U.S.C. § 1983 for a policy that is lawful in the ordinary course simply because the policy causes a violation of a federal statute in an exceptional circumstance not foreseen when the policy was adopted or enforced.

2. Whether the Ship Mortgage Act of 1920, which was enacted in order to provide security to mortgagees, confers upon mortgagors a federal right enforceable under 42 U.S.C. § 1983.

3. Whether the Ship Mortgage Act of 1920, which provides an exclusive federal forum for judicial foreclosure of preferred ship mortgages, preempts state enforcement of contractual provisions for non-judicial, self-help remedies.

LIST OF PARTIES

Anita Rexroat and Lee Baca were additional parties in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

The County of Los Angeles, through undersigned counsel, hereby petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One.

OPINIONS BELOW

The opinion of the California Court of Appeal (App., *infra*, 1a-42a) is not officially reported.[1] The opinion of the Superior Court for Los Angeles County (App., *infra*, 43a-46a) is not reported.

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[1] The opinion of the Court of Appeal was initially reported in the advance sheets at 231 Cal. App.3d 1306, 282 Cal. Rptr. 893 (Cal. App. 1991). In accordance with the order of the California Supreme Court, this opinion will be withdrawn from the permanent editions of these reports. *See* Cal. R. Ct. Ann. 976 (Deering 1988).

JURISDICTION

The order of the Court of Appeal was entered on June 28, 1991. (App., *infra*, 1a-42a). The Supreme Court of California entered an order denying review on October 3, 1991. (App., *infra*, 47a). On December 11, 1991, Justice O'Connor extended the time for filing this petition for a writ of certiorari until January 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Civil Rights Act of 1871 provides, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983.

Section 30(K) of the Ship Mortgage Act of 1920, as amended at the time relevant to this case, provided, in relevant part, that:

> A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively.

46 U.S.C. § 951 (Repealed 1988).[2]

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[2] The Ship Mortgage Act was repealed in 1988, 102 Stat. 4752, and the substance of the relevant portion of Section 951 was re-

The Supremacy Clause of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

1. In October 1977, respondent Richard Meilicke was in possession of the 110-foot yacht Magnifico II, from which respondent operated a recording studio business. Around that time, respondent became involved in a dispute regarding ownership of the yacht with Nicolino and Franco Nicoletti. In an effort to avoid the Nicolettis' efforts to gain control of the yacht, respondent attempted to transfer title to his mother-in-law, Anita Rexroat. On October 20, Rexroat, as mortgagor, executed a preferred ship mortgage in favor of Nicolino Nicoletti, as mortgagee.[3] The mortgage included an express provision permitting Nicoletti to use self-help in repossessing the yacht in the event of default.[4] Although the California courts

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enacted without significant change and codified at 46 U.S.C. § 31325. For convenience, this petition will refer to the Ship Mortgage Act and its prior codification in the present tense.

[3] Under the Ship Mortgage Act of 1920, any mortgage on a United States vessel in favor of a United States citizen has preferred status, with a few exceptions immaterial here, upon satisfaction of certain endorsement and recordation requirements. 46 U.S.C. § 922. A preferred ship mortgage may be foreclosed by suit *in rem* in admiralty under specified procedures, and in such foreclosure suit it has priority over most other claims against the vessel. 46 U.S.C. §§ 951-954.

[4] Article XIII of the preferred ship mortgage provided in part: "In the event of default . . . Mortgagee may take possession of said vessel, its tackle, equipment, etc., without process of law, and

later determined that the mortgage was invalid because it had been obtained by coercion, respondent stipulated in this litigation that "the facts of [the mortgage's] invalidity were not apparent on the face of the document." California Superior Court Reporter's Transcript 53-54.

On the morning of November 10, 1977, the Nicolettis and their attorney went to the Marina del Rey substation of the Los Angeles County Sheriff's Department and spoke to Lieutenant Lee Baca. They showed Lieutenant Baca the mortgage and informed him that Rexroat had defaulted on the mortgage by failing to have the yacht insured. The Nicolettis and their attorney requested the assistance of the Sheriff's Department in exercising their right to self-help repossession. Baca examined the document and determined that on its face it entitled the Nicolettis to possession of the boat. He informed the Nicolettis, however, that because their dispute with respondent was civil in nature, the Sheriff's Department could not become involved other than to keep the peace. The Nicolettis then told Baca that they intended to place anyone who interfered with their repossession efforts under citizen's arrest. Under state law, the Sheriff's Department was required to make a citizen's arrest if so requested. Cal. Penal Code §§ 142 (Deering 1985), 847 (Deering 1983).

In an effort to avoid a confrontation, a Sheriff's Deputy contacted respondent, described the conversation with the Nicolettis, and explained Lieutenant Baca's interpretation of the mortgage and the possibility of a citizen's arrest.[5] Respondent then telephoned his attorney, who advised him to take the yacht to sea to avoid repossession.

Mortgagor shall forthwith surrender possession to Mortgagee who may sell the same at public or private sale after ten (10) days' notice to Mortgagor by mail."

[5] The Sheriff's Deputy initially spoke with a guard who was stationed on the Magnifico II. The guard then telephoned respondent, who came to the dock.

When the Nicolettis arrived at the dock, they saw respondent preparing to leave shore and protested that their yacht was being stolen. Respondent departed for the harbor. Acting under orders of Lieutenant Baca, the Harbor Patrol intercepted the yacht and, under threat of arrest, persuaded respondent to return to dock.

Following the yacht's return, Lieutenant Baca personally went to the dock in an effort to avert a violent confrontation. Respondent and the Nicolettis were engaged in a heated argument and each side requested Baca to arrest the other. Respondent refused voluntarily to leave the yacht so that the parties could discuss the dispute elsewhere, and Baca cautioned respondent that he was risking arrest for breach of peace. Respondent and his wife then peacefully accompanied Baca to the Sheriff's Department substation to discuss the matter with the Nicolettis. A Sheriff's Deputy remained behind to guard the yacht.

At the substation, the parties continued to argue about the yacht's ownership. Ultimately, it was decided that neither party would return to the yacht until the ownership dispute was resolved by the courts. In the meantime, a guard retained by the Nicolettis would remain on the yacht. In accordance with this resolution, the Sheriff's Deputy soon yielded custody of the boat to the Nicolettis' guard. The evidence was in dispute whether respondent fully and voluntarily agreed to this temporary resolution of the dispute.

2. Lieutenant Baca's response to the potentially violent altercation over the attempted repossession of the Magnifico II was consistent with existing County policy regarding the Sheriff's Department's role in attempted repossessions. Essentially, County policy was that the Department does not undertake to determine who is correct as a matter of law; instead, the Department's role is to keep the peace and to enforce the criminal law. In accordance with this policy, Lieutenant Baca declined to

make any binding determination regarding who was entitled to possession of the Magnifico II. Rather, Lieutenant Baca confined his efforts to enforcing interim measures so that a confrontation could be avoided while the dispute was being resolved in the courts.

A Sheriff's Department training guide in force at the time generally instructed that if a person in possession of property objects to repossession and asserts his right to a pre-repossession hearing, the repossessor cannot seize the property without a prior judicial determination. However, Department training also instructed officers that, as a matter of law, parties can waive their right to judicial process prior to repossession—*i.e.*, if the mortgagor has obtained a waiver, a "self-help" repossession may be permitted. The mortgage provision allowing self-help repossession in this case constituted such a waiver. Consistent with policy guidelines, Lieutenant Baca properly took respondent's facially valid waiver of his right to judicial process into account in his efforts to keep the peace. At the same time, Lieutenant Baca also followed Department policy by preserving respondent's right to an immediate judicial determination of the right of possession under the mortgage. The County did not have any policy or provide any training specifically relating to rights to repossession under preferred ship mortgages.

3. Immediately after November 10, 1977, respondent filed in state court a civil lawsuit against the Nicolettis and others seeking recovery of the yacht and damages. Respondent twice petitioned the state court for a preliminary injunction directing the Nicolettis immediately to return the boat, which the state court twice denied.[6] After three years of proceedings, the ship mortgage was held invalid as having been obtained through coercion, and in 1980 the state court entered judgment in favor of respondent and awarded him $3.76 million in damages.

[6] Respondent also unsuccessfully sought an order restricting the Nicolettis' use of the yacht.

The court also awarded respondent possession of the yacht, which by that time had deteriorated considerably due to lack of maintenance. Respondent later sold the yacht to a third party for $55,000 plus a release of other litigation valued at over $400,000.

Meanwhile, on October 30, 1978, respondent filed the present action against the County and Lieutenant Baca.[7] Respondent alleged, *inter alia*, that the County and Lieutenant Baca were liable under 42 U.S.C. § 1983 for violating his federal rights by aiding the Nicolettis' efforts to obtain possession of his yacht.[8] The court bifurcated the trial, and on June 28, 1984, following the jury's inability to agree on a liability verdict, the parties waived their right to a jury trial and submitted the case to the court, which promptly rendered an oral decision against the County. Judgment was entered in favor of the County's co-defendant, Baca, on grounds of good-faith immunity. Trial was then held on damages, and the court issued its final judgment as to both liability and damages on February 14, 1986. (App., *infra*, 43a-46a).[9]

As the basis for the County's liability, the court found that the Sheriff's Department had failed to train its officers or to adopt a policy with respect to enforcement of preferred ship mortgages. The court held that "this *lack of policy* led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights." (App., *infra*, 44a (emphasis added)). The court further stated that the County "knew, or should have known that such results could occur in the absence

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[7] Anita Rexroat was also a plaintiff in the trial court. During the appellate process, Rexroat assigned her entire interest to respondent and withdrew from the case.

[8] Respondent also alleged various state law claims, on which a non-suit was granted following presentation of respondent's case.

[9] The judgment as reproduced in the Appendix reflects an amendment to correct a clerical error that was entered on February 24, 1986.

of a definite and understandable policy." (*Id.*). The damages award at the time totaled almost $6.8 million; with post-judgment interest and "continuing lost profits" —which continue to this day—the County's liability under the award now exceeds $9 million.[10]

The County appealed the Superior Court's decision on both federal and state law grounds. On June 28, 1991, the Court of Appeal, in a lengthy opinion that was certified for publication, affirmed the judgment in all respects. (App., *infra*, 1a-42a). With regard to the federal issues raised by the County, the court held that the County's liability under Section 1983 rested upon its general policy of permitting self-help repossessions where the parties have waived their right to legal process. (App., *infra*, 15a-18a). The court held that, although "[t]he language of the Ship Mortgage Act is not . . . clear," that Act preempts the use of self-help provisions under state law under preferred ship mortgages. (App., *infra*, 18a-22a). Accordingly, the court concluded that "defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having [Nicoletti] go through 'due process,' violated plaintiff's federal statutory rights" under the Ship Mortgage Act, and that the County therefore was liable under 42 U.S.C. § 1983. (App., *infra*, 23a).

The California Supreme Court denied the County's petition for discretionary review on October 3, 1991. At the same time, the court ordered that the Court of Appeal's decision not be officially published. (App., *infra*, 47a).[11]

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[10] The award consisted of: $3,000,000 for the value of the boat and equipment; $516,063 for lost personal property; $2,483,292 for lost profits; $42,529 for expenses in attempting to recover the boat; $750,000 for emotional distress and physical and mental suffering; $901.36 per day "continuing lost profits" from the date of judgment until paid; and 10% annual post-judgment interest. In addition, the court subsequently awarded respondent $300,000 in attorney's fees.

[11] The County has petitioned the Superior Court to reopen its judgment solely with respect to the question of the calculation of

REASONS FOR GRANTING THE PETITION

The Court of Appeal in this case upheld the judgment against the County because the County's policy of training its officers that a party may waive his right to judicial process prior to repossession—a policy that accurately and lawfully embodied existing legal standards—did not take into account the allegedly preemptive effect of the Ship Mortgage Act. Despite the fact that the County did not know and could not have known of this putative "preemptive" effect, the County's failure to train its officers regarding this purported narrow "exception" to existing law has rendered the County liable for an enormous award under Section 1983.

The decision below warrants review by this Court on three separate and important questions of federal law. First, the Court of Appeal's decision is inconsistent with this Court's decision in *City of Canton* v. *Harris*, 489 U.S. 378 (1989), and the Ninth Circuit's decision in *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989). The rule of Section 1983 municipal liability adopted by the court below exposes municipalities to extraordinary damages awards based upon failure to train police officers on myriad technical and shifting points of law. In effect, the rule announced below imposes strict liability if an agent of municipal government unwittingly violates an individual's statutory rights while implementing an ordinarily lawful municipal policy. Second, assuming *arguendo* that the Ship Mortgage Act has preemptive effect over contractual self-help provisions, the application of that Act to confer upon respondent rights enforceable under Section 1983 is in conflict with this Court's decision in *Golden State Transit Corp.* v. *City of Los*

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post-judgment interest. Because the federal questions decided by the Court of Appeal will survive and require decision regardless of the outcome of the petition to reopen, the Court of Appeal's decision is final within the meaning of 28 U.S.C. § 1257. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480-81 (1975).

Angeles, 493 U.S. 103 (1989). Finally, the Court of Appeal's interpretation of the Ship Mortgage Act to preempt state enforcement of contractual self-help provisions presents an important question of preemption doctrine, on which the state and federal courts are in conflict.

I. A MUNICIPALITY CANNOT BE LIABLE FOR NONFEASANCE UNDER SECTION 1983 ABSENT DELIBERATE INDIFFERENCE.

A. In *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978), this Court held that a municipality cannot be held liable under Section 1983 based upon a theory of *respondeat superior*; instead, liability may be imposed on a municipal government only when "execution of a government's policy or custom" causes the deprivation of a federal right. *Monell*, 436 U.S. at 694. This limitation was derived from the language of Section 1983, which imposes liability only on persons who "subject, or cause to be subjected" any individual to a deprivation of federally protected rights. *Id.* at 691-94. *Monell* thus established "a fault-based analysis for imposing municipal liability." *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); see also *id.* at 828 (Brennan, J., concurring) (Congress intended "to preclude municipal liability in cases in which the city itself was not at fault"); *City of Springfield* v. *Kibbe*, 480 U.S. 257, 270 (1987) (O'Connor, J., dissenting) (plaintiff must show "that the city was at fault for establishing the policy").

Subsequent decisions of this Court have made substantial progress toward elaborating what constitutes a "policy or custom" for which a municipality can be held liable. See *Monell*, 436 U.S. at 694. In particular, the Court has made clear that a municipality's liability is limited to acts that the local government has "officially sanctioned or ordered." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986). Thus, a municipality is not liable merely because its policy leaves an officer with discretion to com-

mit a particular act. *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988). Moreover, " 'municipal liability under § 1983 attaches where—and only where—*a deliberate choice* to follow a course of action is made from among various alternatives' " by municipal policymakers. *City of Canton* v. *Harris*, 489 U.S. 378, 389 (1989) (quoting *Pembaur*, 475 U.S. at 483-84 (plurality opinion)) (emphasis added). In other words, the requirement of a municipal policy or custom "implies a course of action consciously chosen from among various alternatives" by the defendant. *Tuttle*, 471 U.S. at 823 (plurality opinion).

In *City of Canton*, this Court addressed the circumstances under which a municipality may be held liable under Section 1983 for failing to train its employees in the execution of a lawful policy. The Court held that a municipality may be liable only when its failure to train "amounts to deliberate indifference to the rights of persons with whom [its agents] come into contact." *Canton*, 489 U.S. at 388. This standard reaffirmed the Court's prior decisions that a "policy" requires a "deliberate" or "conscious" choice. *Id.* at 389. Deliberate indifference may be established when the need for training is "so obvious" that policymakers "know to a moral certainty" that it is necessary, or when a past pattern of violations makes it "plainly obvious" that further training is needed. *Id.* at 390 & n.10. The Court emphasized, however, that the mere fact that further training could have prevented the violation will not support a finding of liability. *Id.* at 391.

B. In this case, the County adopted two affirmative policies that influenced its agents' actions. First, the County had a policy that the Sheriff's Department should intervene in civil disputes only to keep the peace, and should not take sides or attempt to determine the parties' rights. Clearly, this policy did not "officially sanction or order" any purported violation of respondent's statutory

right to "possession" of his yacht. Respondent has not claimed that this policy contributed to his alleged injury.

Second, the County trained its officers that a party may lawfully waive his or her right to judicial process prior to repossession. The Court of Appeal held that the County's adoption of this policy recognizing the validity of due process waivers—in the absence of an exception for "preferred ship mortgages"—caused the officers to violate respondent's rights under the Ship Mortgage Act, thereby rendering the County liable under Section 1983. In fact, the County's generally valid policy did not "cause" any injury to respondent.[12]

More important, to the extent that the County's "waiver" policy "caused" a violation of federal rights, it did so *only* because the County did not give its officers *specific* instruction on "self-help" repossessions (*i.e.*, waiver of judicial process) in connection with preferred ship mortgages. Thus—as the trial court recognized (*supra*, pp. 7-8)—respondent's claim really is not based on any affirmative policy of the County, but rather upon the County's *failure to provide additional training* relating to preferred ship mortgages. This Court always has insisted that the policy on which liability rests must be

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[12] The court below erred in concluding that this "policy" acknowledging the validity of self-help repossessions constituted the "moving force" behind the asserted violation of respondent's asserted statutory rights. *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 694-95 (1978); *see also Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981). As the Court of Appeal recognized, the affirmative policy directive which guided Lieutenant Baca's actions was the obligation to maintain the peace; his training regarding waiver of due process rights at most "colored" his efforts to achieve that end. (App., *infra*, 18a). Respondent failed to show that Lieutenant Baca would not have acted precisely as he did even had he not been trained that due process rights may be waived. Moreover, given the immediate determination by the Superior Court that respondent was not entitled to possession—*i.e.*, the denial of his motions for a preliminary injunction—it simply is not true that the officers' actions were the "moving force" behind respondent's loss of possession of the yacht.

the *direct* cause of the violation of federal rights.[13] The Court of Appeal's focus on petitioner's general policy (of recognizing waivers) rather than the specific "error" alleged (*i.e.*, the failure to train that such waivers do not apply to preferred ship mortgages) violates this principle. What "caused" the purported harm in this case was not the County's generally correct and lawful policy of recognizing waivers, but the *absence* of policy or training that such waivers were not "valid" in the case of preferred ship mortgages.

Because it is the *absence* of "training" regarding preferred ship mortgages that underlies respondent's Section 1983 claim, the imposition of liability on the County is inconsistent with this Court's decisions. Respondent introduced no evidence that the County ever made any *deliberate decision* regarding the application of its policy on repossessions in the context of preferred ship mortgages. Nor did respondent show a pattern of past violations of the Ship Mortgage Act or other circumstances that would make the need for specific training on the Act sufficiently evident to support a finding of deliberate indifference.

To the contrary, the facts absolutely precluded any such finding. As of 1977, there were no reported decisions anywhere in the country addressing whether a self-help provision in a preferred ship mortgage may be enforceable. See *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1569 (W.D. Wash. 1983) (court could find no precedent regarding private foreclosure of preferred ship mortgage). In fact, the only decision even to approach the issue had implicitly assumed that self-help foreclosure would be available. *Challenger, Inc.* v. *Durno*, 227 F.2d

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[13] *See City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion) (municipality cannot be held liable for a police officer's unconstitutional shooting of a fleeing suspect simply because the municipality has a "policy" of maintaining a police force); *see also City of Canton* v. *Harris*, 489 U.S. 378, 389 n.9 (1989) (citing *Tuttle*).

918, 922 (5th Cir. 1955). It is thus clear that private repossession under preferred ship mortgages was not a frequently occurring circumstance, nor one that a responsible local government was required—as a matter of federal civil rights law—to address.

C. This Court never has affirmed municipal liability in circumstances such as those posed by this case, in which the municipal policy in question generally is lawful and appropriate. Indeed, in every case in which this Court has imposed municipal liability under Section 1983, the "policy" in question necessarily entailed a violation of federal rights in every situation to which it applied. See, *e.g.*, *Pembaur*, 475 U.S. 469 (authorization of warrantless forcible entry into private premises); *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (decision to terminate employee without hearing); *Monell*, 436 U.S. 658 (policy of forcing pregnant employees to take maternity leave after fifth month). By contrast, the County's policy here accurately and lawfully instructed its employees on a relevant question of federal law. See *D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972) (party may contractually waive right to due process before being deprived of property).

It is flatly contrary to prior decisions of this Court to suggest that the County may be liable under Section 1983 for failing to adopt a policy on foreclosure of preferred ship mortgages. The County's only *deliberate* act was the adoption of a *lawful* policy regarding waiver of due process rights in the context of civil repossessions. Where, as here, application of a municipality's policy ordinarily is lawful, the municipality should be held liable for failure to carve out an "exception" to the policy only where the municipality can be said to have been deliberately indifferent to the need for an exception. See *Canton*, 489 U.S. at 388-92. Given that no "deliberate" choice by the County caused respondent's alleged "injury," the imposition of liability under Section 1983 simply cannot be reconciled with the prior decisions of this Court.

The decision below also is inconsistent with the Ninth Circuit's decision in *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989). In *Merritt*, the County trained its police officers that an automobile cannot lawfully have two different Vehicle Identification Numbers (VINs) on the dashboard and on the engine block. Following county policy, police officers arrested the driver of a car with conflicting VINs. In fact, due to unusual circumstances on which the officers had not been trained, the divergent VINs on this car were lawful, and the driver sued the County under Section 1983 for unlawful arrest. As in this case, the County's generally correct training of its officers—*i.e.*, that conflicting VINs are unlawful—could be said to have "caused" the driver's arrest. Nonetheless, the Ninth Circuit affirmed a judgment in favor of the County, reasoning that where the County's general policy was lawful and there was no evidence of deliberate indifference in failing to address the unusual exception, the injury could not fairly be attributed to a deliberate policy decision of the County. *Id.* at 771.[14]

A focus on the actual municipal policy that governs the circumstances in question—rather than post-hoc adoption of necessary "exceptions" to otherwise valid policies—is necessary to avoid saddling municipalities with potentially crippling liabilities for their lawful policy and training decisions. The law is replete with rules that are ordinarily valid but to which there may be technical, counter-intuitive exceptions. Clearly, a municipality may, and in some instances must, train its agents regarding these general rules. Where the exception to a rule is a major one

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[14] *See also Buffington* v. *Baltimore County*, 913 F.2d 113, 122-23 (4th Cir. 1990) (county could not be held liable for suspect's suicide where training given to officers did not show deliberate indifference), *cert. denied*, 111 S. Ct. 1106 (1991); *Dorman* v. *District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989) (similar); *Santiago* v. *Fenton*, 891 F.2d 373, 381-82 (1st Cir. 1989) (city's failure to give police officers more than four hours of training in constitutional law did not establish deliberate indifference to citizens' rights).

or one that the agents will frequently encounter or have encountered, the municipality should be expected to adopt a policy on the exception as well. A municipality cannot, however, be expected to anticipate and to provide training on minor exceptions that have not even been established at the time the policy is made. To hold a municipality liable for its innocent failure to anticipate an extraordinary application of its policy would transform the municipal fault standard of Section 1983 into a strict liability standard for local governments.

II. THE SHIP MORTGAGE ACT DOES NOT CONFER FEDERAL RIGHTS ON MORTGAGORS.

A state actor is liable under Section 1983 for subjecting any person to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. A Section 1983 claim does not arise every time a person is harmed as a result of a violation of federal law; rather, Section 1983 is applicable only when federal law confers a *right* upon the person. *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 (1990); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 105-06 (1989).[15]

Whether a federal statute creates a right that can give rise to a Section 1983 action is determined by a three-part test:

> In all cases, the availability of the § 1983 remedy turns on whether the statute, by its terms or as interpreted, [1] creates obligations sufficiently specific and definite to be within the competence of the judiciary to enforce, [2] is intended to benefit the putative plaintiff, and [3] is not foreclosed by express

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[15] Because the Supremacy Clause confers no individual rights, a violation of the Supremacy Clause does not in itself create a cause of action under Section 1983. *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 107-08 (1989).

> provision or other specific evidence from the statute itself.

Golden State, 493 U.S. at 108 (quotations omitted). In this case, assuming *arguendo* that the Ship Mortgage Act preempts the states from recognizing contractual self-help provision (see *infra*, pp. 19-22), such preemption gives rise to no Section 1983 claim in favor of respondent because the Ship Mortgage Act was not intended to benefit mortgagors.

This Court has applied the "intended to benefit" standard in three cases involving alleged violations of statutory rights under Section 1983, in each of which the Court has found a statutory right. *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987), involved a statute limiting the rent and utility charges that can be imposed on tenants in public housing projects. In that context, "[t]he intent to benefit tenants [was] undeniable." *Id.* at 430. In *Wilder* v. *Virginia Hosp. Ass'n*, the question was whether health care providers are intended beneficiaries of a provision of the Medicaid Act requiring the states to develop plans that provide them with reasonable and adequate reimbursement. Again, the Court held that the statute was intended to benefit health care providers, citing statutory language expressly mentioning providers. 110 S. Ct. at 2517-18; but see *id.* at 2525-27 (Rehnquist, C. J., dissenting) (pointing out absence of language or context specifically indicating rights). Finally, the most difficult question regarding the intended beneficiary of a federal statute arose in *Golden State*. There, the Court determined that because the overriding purpose of the National Labor Relations Act was to create rights in labor and management against each other and against the state, the particular provision at issue should be interpreted as intended to protect employers against state interference. 493 U.S. at 109-12.

This case plainly differs from *Wright*, *Golden State*, and *Wilder* because the Ship Mortgage Act contains no

language that could even arguably be construed as conferring relevant rights or benefits on mortgagors. *Cf. California* v. *Sierra Club*, 451 U.S. 287, 294 (1981) (in context of implying private right of action, statutory right will rarely be found where statutory language does not on its face indicate beneficiary); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 771-73 (1981) (similar); *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-93 (1979) (similar).[16] Moreover, the legislative history of the Act unequivocally demonstrates that the intent of Congress was to benefit mortgagees, not mortgagors. See *infra*, pp. 21-22. Even those courts that have found that the Ship Mortgage Act preempts self-help foreclosures have relied not on federal intent to confer rights upon mortgagors, but on a federal interest in uniform procedures. See App., *infra*, 22a; *Nate Leasing Co.* v. *Wiggins*, 789 P.2d 89, 94-95 (Wash. 1990); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Fogle*, 637 F. Supp. 305, 306-07 (N. D. Cal. 1985). This clearly is a case in which any preemption "benefits particular parties only as an incident of the federal scheme of regulation," with the result that no remedy under Section 1983 is available. *Golden State*, 493 U.S. at 109; see also *id.* at 110-11 (distinguishing preemption by federal law which confers rights or benefits on private

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[16] In determining whether a federal statute creates an implied private right of action, one consideration is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff?" *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) (quoting *Texas & Pac. R. R.* v. *Rigsby*, 241 U.S. 33, 39 (1916)) (emphasis in *Cort*). As this Court has recently noted, implication of a private right of action involves constitutional concerns that are not raised under Section 1983, and the full *Cort* four-part test is therefore inapplicable in Section 1983 cases. *Wilder* v. *Virginia Hosp. Ass'n*, 110 S. Ct. 2510, 2517 n.9 (1990). The inquiry into the existence of an underlying federal right is, however, substantially similar in both contexts. *See Golden State*, 493 U.S. at 105-07; *Wilder*, 110 S. Ct. at 2526 (Rehnquist, C. J., dissenting); *Wright* v. *City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 432-33 (1987) (O'Connor, J., dissenting).

parties from preemption by federal law designed merely to maintain uniform administration).

In affirming respondent's recovery under Section 1983 based on the preemptive effect of the Ship Mortgage Act, the decision below is flatly inconsistent with the prior decisions of this Court. To permit a Section 1983 remedy under such circumstances would effectively read out of the statute the limitation that it protects only "rights, privileges, or immunities," and would subject municipalities to damages actions any time their conduct is found to be in violation of federal law. Given the substantial, and unwarranted, expansion of liability inherent in the application of Section 1983 by the court below, review of this issue by this Court clearly is warranted.[17]

III. THE SHIP MORTGAGE ACT DOES NOT PREEMPT STATE ENFORCEMENT OF CONTRACTUAL PROVISIONS FOR NONJUDICIAL FORECLOSURE.

The Ship Mortgage Act grants the United States district courts exclusive jurisdiction in admiralty over suits *in rem* to enforce the lien in preferred ship mortgages. 46 U.S.C. § 951. The Court of Appeal in this case held that this provision not only preempts the states from entertaining foreclosure suits in their own courts, but also bars them from recognizing contractual provisions for self-help foreclosure. (App., *infra*, 18a-22a). The court held that permitting self-help repossession would "defeat the goal of having uniform procedures on which the

[17] On December 2, 1991, the Court heard argument in *Suter* v. *Artist M.*, No. 90-1488, which raised the question whether the Adoption Assistance and Child Welfare Act of 1980 confers rights on abused or neglected children through its provisions requiring states to adopt foster care and adoption plans including specified features as a condition for receiving federal funds. Because the decision in *Suter* may affect the analysis of when a statute creates a federal right within the meaning of Section 1983, the Court should consider withholding its decision whether to grant certiorari in this case until after *Suter* has been decided. At the very least, it may be appropriate to vacate the judgment below and remand for further consideration in light of *Suter*.

parties to a preferred ship mortgage . . . can rely in the event of a default." (App., *infra*, 22a).

In deciding that the Ship Mortgage Act preempts self-help foreclosure, the Court of Appeal expressly followed a recent decision of the Washington State Supreme Court that reached the same conclusion. *Nate Leasing Co.* v. *Wiggins*, 789 P.2d 89 (Wash. 1990); see also *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Fogle*, 637 F. Supp. 305 (N.D. Cal. 1985). However, both the decision below and the decision of the Washington Supreme Court in *Nate Leasing* directly conflict with the holding of the Alaska Supreme Court in *Brown* v. *Baker*, 688 P.2d 943, 949 (Alaska 1984).[18] The Alaska Supreme Court reasoned that congressional prescription of an exclusive forum and procedure for judicial foreclosure does not affect the separate availability of contractual, nonjudicial remedies under state law. *Id.*

Under the Supremacy Clause, state law will be preempted by a federal statute when the federal statute expressly provides for preemption or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). There will be no preemption, however, "when Congress could have regulated 'a distinctive part of a subject which is peculiarly adapted to a local regulation, . . . but did not.' "

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[18] *See also Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114-17 (S.D. Fla. 1988) (holding that the Ship Mortgage Act does not preempt self-help foreclosure); *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1570 (W.D. Wash. 1983) (holding that the Act does not preempt self-help mortgage provisions, "[t]he validity of [which is an] issue[] for the state to resolve"); *Challenger, Inc.* v. *Durno*, 227 F.2d 918, 919 n.1, 922 (5th Cir. 1955) (assuming validity of contractual provision for self-help foreclosure as basis for decision).

Kalo Brick, 450 U.S. at 317 (quoting *Hines*, 312 U.S. at 68 n.22). In this case, the statute does not expressly preempt contractual self-help provisions. Such provisions should therefore be held preempted only if their use would conflict with the clear intent of Congress in passing the Ship Mortgage Act. See *Kalo Brick*, 450 U.S. at 317; *Florida Lime*, 373 U.S. at 142.

The purpose of the Ship Mortgage Act was to "afford[] substantial security to persons supplying essential financing to the shipping industry." *J. Ray McDermott & Co.* v. *Vessel Morning Star*, 457 F.2d 815, 817 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972) (quoting *Merchants & Marine Bank* v. *The T. E. Welles*, 289 F.2d 188, 193-94 (5th Cir. 1961)). Prior to 1920, there was no federal jurisdiction over a suit to foreclose a ship mortgage. *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 32 (1934). As a result of this circumstance, the "'mortgage security on ships'" was "'practically worthless,'" and investors were reluctant to lend money using ships as collateral. *Id.* at 39 (quoting S. Rep. No. 473, 66th Cong., 2d Sess., p. 9). Congress therefore determined that promotion of the nation's merchant marine required provision of a uniform federal foreclosure remedy so that "'the mortgagee . . . [may be] made more secure in his interest in the vessel than he is under existing admiralty law.'" *Id.* (quoting H. R. Rep. No. 1102, 66th Cong., 2d Sess., p. 34); see also *Nate Leasing*, 789 P.2d at 91; *Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114 (S. D. Fla. 1988). This purpose of protecting creditors required that the states be precluded from in any way limiting or modifying the judicial foreclosure remedy. See *McDermott*, 457 F.2d at 817-18. Protection of creditors did not, however, require that mortgagors be forbidden from agreeing to self-help foreclosure.[19] Indeed, neither the statutory

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[19] Congress was not interested in uniformity for the sake of uniformity; in fact, while Congress granted the federal courts exclusive jurisdiction over *in rem* foreclosure suits, it permitted the state courts concurrent jurisdiction over *in personam* actions for monetary deficiencies. *See* 46 U.S.C. § 954.

language nor the legislative history indicates any intent to preempt the states from recognizing consensual agreements to permit nonjudicial foreclosure.

The decision of the Alaska Supreme Court in *Brown* v. *Baker* that the Ship Mortgage Act does not preempt contractual self-help provisions is consistent with the language, purpose and history of the Ship Mortgage Act. The contrary conclusion of the court below and the Washington Supreme Court is not. This Court should grant certiorari in order to resolve the conflict over the preemptive effect of the Ship Mortgage Act.[20]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 14, 1992

[20] This conflict remains relevant despite the 1988 repeal of the Ship Mortgage Act and recodification of its substantive provisions. *See* supra, p. 2 n.2. In connection with the recodification, Congress expanded the options available for bringing an *in personam* action for indebtedness. *See* H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. and Admin. News 6104, 6114. The provision for exclusive federal jurisdiction over *in rem* actions that forms the basis for the preemption argument, however, remained substantially unchanged. *See* 46 U.S.C. § 31325(b)(1), (c).

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B020736

(Super. Ct. No. WEC56172)

RICHARD MEILICKE,
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,
Defendant and Appellant;

LEE BACA,
Defendant and Respondent.

[Filed Jun. 28, 1991]

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Robert C. Nye, Judge. Affirmed.

DeWitt W. Clinton, County Counsel, Owen L. Gallagher, Principal Deputy County Counsel, Lascher & Lascher, Wendy C. Lascher and Susan B. Lascher for Defendant and Appellant and Defendant and Respondent.

Laurence H. Tribe and Kenneth J. Chesebro for Plaintiff and Appellant.

INTRODUCTION

Defendant County of Los Angeles appeals from a judgment in favor of plaintiff Richard Meilicke, also known as Richard Compton.[1] Plaintiff appeals from an order granting a nonsuit in favor of defendants County of Los Angeles and Lee Baca on plaintiff's state law causes of action, from the judgment to the extent it does not include an award of prejudgment interest, and from an order denying his motion for prejudgment interest.[2]

STATEMENT OF FACTS

Background

In 1972, plaintiff purchased his boat, the Magnifico II (Magnifico), a 110-foot former naval vessel, from Anthony Sanucci; title remained in Sanucci's name until plaintiff completed making payments on the boat on October 6, 1977. Plaintiff restored and made significant improvements to the boat until it was elegant and luxurious and lived up to its name. The boat was kept at a dock in Marina del Rey.

The Magnifico also was profitable. Plaintiff initially used it to complement his retail scuba diving business, it was chartered by various businesses and it was used in the production of many movies and television shows. In 1975, plaintiff created a recording studio aboard the boat; it became well-known in the recording industry and was used for recording record albums and demonstration tapes.

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[1] The county also purports to appeal from an order denying its motion to vacate judgment—which is nonappealable (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 111, pp. 128-129)—and an order awarding attorney's fees. Inasmuch as the county makes no contention regarding the latter order, its challenge thereto may be deemed waived. (*Id.*, § 479, pp. 469-471.)

[2] Although Anita Rexroat was a plaintiff below and was included on plaintiff Richard Meilicke's notice of appeal, she has since assigned her interest in the litigation to plaintiff and abandoned her appeal.

The Magnifico also was used by many recording stars for private relaxation and pleasure.

Plaintiff began living aboard the Magnifico in 1973 and kept most of his clothing, personal effects and records on the boat. When he married in early 1977, he also maintained a small apartment in Marina del Rey for use when the boat was chartered by others.

Sometime in 1977, plaintiff became involved in a dispute with the Nicoletti family regarding the Magnifico. In early October, the Nicolettis attempted to take posession of the boat using forged documents from the Department of Motor Vehicles, but plaintiff was able to recover the boat from them with the help of the Los Angeles County Sheriff's Department. Plaintiff attempted to transfer title to the boat to his mother-in-law, Anita Rexroat, in order to keep it from the Nicolettis, but they learned of his attempt and forced him to have Rexroat execute a preferred ship mortgage in favor of Nicolino Nicoletti on October 20. It was stipulated the preferred ship mortgage was "invalid as having been obtained through coercion, the facts of which invalidity were not apparent on the face of the document."

The November 10, 1977 Incident

On the morning of November 10, 1077, two Nicoletti brothers and their attorney, William Davis, came to the Marina del Rey substation of the Los Angeles County Sheriff's Department. There they spoke to defendant Lieutenant Lee Baca, the operations commander, about their intent to repossess the Magnifico, handing him a package of documents which included a copy of the preferred ship mortgage, a notice of default, a Department of Transportation registration document and a handwritten agreement or declaration. Attorney Davis explained the default was the failure to have the boat insured, and articles in the preferred ship mortgage gave Nicolino Nicoletti the right to repossess the boat.

Lieutenant Baca read the documents and concluded the preferred ship mortgage gave Nicoletti the right to repossess the boat. While he was not sure Nicoletti actually was entitled to possession of the boat, he believed the document entitled him to possession.

Lieutenant Baca told the Nicolettis and Attorney Davis the dispute was civil in nature, so the Sheriff's Department could not become involved other than to keep the peace. Attorney Davis indicated his clients wanted to place under citizen's arrest anyone who interfered with their attempt to repossess the boat. Lieutenant Baca told them not to confront plaintiff or his guard on the boat in a hostile manner and suggested that any action should be taken with plaintiff's advance knowledge.

According to Lieutenant Baca, he then telephoned plaintiff, informed him of the Nicolettis' plans and suggested that plaintiff meet with the Nicolettis at his office in order to resolve their dispute peaceably. Plaintiff said the Nicolettis were Mafia members and he feared them, but he nonetheless agreed to meet them at Lieutenant Baca's office that afternoon. Plaintiff said nothing about the preferred ship mortgage having been obtained by coercion and the Nicolettis' previous attempt to obtain the Magnifico. However, according to plaintiff, such a conversation never took place.

Lieutenant Baca sent Deputy Doyle Smith down to the dock to speak to the guard plaintiff had stationed on the Magnifico, "Sandy" Sanderson (Sanderson). Lieutenant Baca told him that the clause in the preferred ship mortgage providing for repossession was valid, but repossession involved a potentially volatile situation. He was to talk to Sanderson, show him the preferred ship mortgage and see if he could get cooperation from him. Deputy Smith could not say what kind of cooperation he was seeking, but explained he was to make clear to Sanderson his option of leaving the boat and avoiding the possibility

of being placed under citizen's arrest if he was perceived as trespassing by the person arresting him; the deputy had determined the Nicolettis felt they now had ownership of the Magnifico and were capable of placing Sanderson under arrest.

Deputy Smith understood the role of the Sheriff's Department in civil disputes was not to take sides or enforce the demands of one side but to remain neutral and maintain the status quo. The department's only duty was to make sure there was no breach of the peace. When he went to the dock to speak to Sanderson, the Nicolettis were not there, so there was no threat of a breach of the peace, but he felt there was the potential for a disturbance at some point. Deputy Smith read the preferred ship mortgage to Sanderson and explained that, according to the document, the ship had reverted to Nicolino Nicoletti. The deputy advised Sanderson if he remained on the boat he could be put under citizen's arrest for trespassing. Sanderson indicated he understood.

Sanderson telephoned plaintiff, who immediately came down to the Magnifico. Deputy Smith told him the same things he had told Sanderson. Plaintiff telephone his attorney, Carleton Russell, for advice. Attorney Russell told him federal law protected the boat from seizure under a preferred ship mortgage except by a federal marshal acting under court process, such as an arrest warrant, and he advised plaintiff to take the boat out to sea to avoid any attempted repossession.

At some point Deputy Smith apparently left the area. Later, Sheriff's Deputy David Cowen, on patrol in his vehicle, heard a radio dispatch regarding a boat theft and proceeded to the dock where the Magnifico was located. Some people by the dock—presumably the Nicolettis, though Deputy Cowen never asked their names—said their boat was being stolen. Deputy Cowen went down onto the dock to the Magnifico, where plaintiff was

preparing to take the boat out. He told plaintiff to stop, but plaintiff did not. He returned to his vehicle and called the dispatcher with the information the Magnifico was being taken out. During this time, Deputy Smith returned to the scene.

Plaintiff took the Magnifico from the dock and attempted to leave the harbor and go out to sea. Lieutenant Baca was notified, and he called the Harbor Patrol. He first testified he told the Harbor Patrol the Magnifico should not leave the harbor because it was involved in an ownership dispute; he was to meet plaintiff and the Nicolettis at the boat at 2:30 that afternoon. He then indicated his understanding at the time of trial was that the Harbor Patrol initially intercepted the boat based on a grand theft call received by them; he did not know who made the call. Lieutenant Baca then testified he based his order that the boat not be allowed to leave he harbor on the grand theft call, in part. He then denied that the Harbor Patrol intercepted the boat based on a civil dispute over ownership or because plaintiff was trying to evade process. He then denied that he ordered that the boat not be allowed to leave the harbor but just mentioned it in response to a Harbor Patrol call.

Sergeant Thomas P. Sherrill and Officers Robert Alan Woolner and Oliver Ray White of the Harbor Patrol went out on a Harbor Patrol boat to intercept the Magnifico. Sergeant Sherrill testified they went out after the Harbor Patrol received a call from the Sheriff's Department requesting backup regarding grand theft. However, on his report and in his deposition he stated the backup request involved an ownership dispute. Officer White testified the call was to intercept the boat and return it to the dock because it was trying to evade civil process; the daily log indicated the call involved a registered owner dispute.

The three officers stopped or slowed the Magnifico and requested that plaintiff return the boat to the dock; plain-

tiff refused to do so and continued going toward the sea. They stopped him a second time, ordered him to return to the dock and threatened to board the boat and arrest him if he did not do so. Plaintiff said he did not want to return because someone was trying to take his boat from him, and he was doing so under duress or protest; he then turned the boat around and returned to the dock, escorted by the Harbor Patrol boat. At the dock, the Harbor Patrol officers boarded the Magnifico.

A number of sheriff's deputies, including Deputies Smith and Cowen, were present at the dock when the Magnifico returned. Deputy Cowen boarded the Magnifico and spoke to plaintiff, explaining he was investigating a possible boat theft. He obtained identification and registration papers from plaintiff, and eventually determined there was no theft but merely a civil dispute over ownership. About this time, plaintiff's wife, Dawn Roddenberry Compton, arrived and boarded the boat. The Nicolettis arrived at the scene and began yelling threats at plaintiff and his wife, who yelled back at them.

Concerned that there might be some kind of confrontation, Deputy Cowen returned to his vehicle and called for a supervisor; Lieutenant Baca responded, and Deputy Cowen left. Plaintiff told Lieutenant Baca he wanted the Nicolettis arrested if they tried to board the Magnifico; the Nicolettis told him they wanted plaintiff arrested because he was on the boat. Lieutenant Baca testified he refused to take plaintiff into custody because of the ridiculousness of the situation. However, he also testified he was obligated to take into custody any person upon whom a citizen's arrest was made, and the law did not give the Sheriff's Department discretion as to whether or not a person placed under citizen's arrest should be taken into custody.

Lieutenant Baca and Deputy Smith attempted to impress upon plaintiff the necessity of leaving the boat and going somewhere else to resolve the ownership question

peaceably. Plaintiff did not want to leave the boat, in that he was afraid the Nicolettis would try to take it. However, he and his wife eventually were escorted off the boat by sheriff's deputies under threat of arrest for breach of the peace. His guard, Sanderson, was taken off the boat in handcuffs. The only person remaining on the boat was Sergeant Sherrill, who was instructed by his supervisor to provide security for the boat.

Plaintiff and Sanderson were driven by Sheriff's deputies to the Marine del Rey substation, where Mrs. Compton joined them. The Nicolettis and Attorney Davis also came to the substation. According to Lieutenant Baca, the parties met and eventually agreed a guard hired by the Nicolettis would be posted on the boat until the dispute between them could be resolved by the court, and none of the parties would board the boat until the dispute was resolved; however, there was no written agreement to that effect. Plaintiff told him he was confident a court would decide the matter in his favor; the lieutenant interpreted this statement to mean he agreed with the Nicolettis as to the posting of a guard until the matter was resolved by a court. Plaintiff never told him he had personal items on the boat he wanted to remove.

Plaintiff denied any such agreement. According to him, he attempted to explain the situation to Lieutenant Baca, including the circumstances under which the preferred ship mortgage had been obtained and the Nicolettis' previous attempt to take the Magnifico using forged documents, but Lieutenant Baca did not want to hear about it. As far as Lieutenant Baca was concerned, the preferred ship mortgage said the Magnifico belonged to Nicolino Nicoletti, and if plaintiff wanted to do anything about the situation he should talk to his attorney. Lieutenant Baca then told plaintiff he was not going to detain him at that time, but if he went back to the boat he would be arrested and jailed. Plaintiff asked Lieutenant Baca to impound the boat, or to allow his own

guard or someone from the Sheriff's Department to stay on the boat to protect his property, but the lieutenant said the Sheriff's Deartment did not do such things and refused. Plaintiff and his wife were allowed to leave, and they did not return to the boat, even to recover their personal property on board.

Sergeant Sherill remained on the Magnifico for 30 to 40 minutes after everyone left. Then a security guard came on board and he left. Sergeant Sherrill understood from Lieutenant Baca the guard was to remain on the boat until the court determined who was entitled to possession of it.

The Nicoletti Litigation

Plaintiff immediately brought suit against the Nicolettis, Attorney Davis and others. He applied for a temporary restraining order and preliminary injunction to recover possession of the Magnifico, but the application was denied. Subsequent requests for an order returning possession of the boat to plaintiff and an injunction to prevent the Nicolettis from moving the boat without first making necessary repairs and providing necessary maintenance also were denied. However, the Nicolettis were enjoined from selling the Magnifico. Ultimately, it was found the preferred ship mortgage was obtained by coercion and plaintiff was awarded over $3.76 million in damages for loss of the boat and his personal property and lost earnings.

The Aftermath

After November 10, 1977, the Nicolettis retained possession of the Magnifico until the State of California foreclosed a tax lien and took the boat to a boat yard, where it remained until July 8, 1980. When plaintiff again was able to obtain possession sometime in 1980, the boat was a shambles: the hull had not been maintained and had suffered extensive corrosion and worm

damage, fittings and equipment had been removed or destroyed. Additionally, most of plaintiff's personal possessions were gone.

As a result of losing the Magnifico, anger at the Sheriff's Department for failure to protect his property and at the litigation process necessary to obtain the boat's return, and having to move in with his mother-in-law while this was going on, plaintiff became severely depressed. He also became obsessed with the litgiation and his attempts to recover the boat. When he finally was able to do so, he decided not to continue his business aboard the boat; he sold boat and business for $55,000 plus a release of other litigation alleged to be worth over $400,000.

County Policy and Training

According to Lieutenant Baca, in a civil dispute or an attempted repossession the Sheriff's Department functions in an impartial manner, does not take sides and does not decide who is right and who is wrong. Its policy is simply to keep the peace and enforce the criminal laws. He acknowledged plaintiff was not arrested for breach of the peace because he quieted down when the lieutenant told him to.

A Sheriff's Department training guide stated that in order to complete repossession, a repossessor must be able to exercise complete dominion and control over the property; the repossessor cannot effect repossession if the owner is in personal possession of the property. If the owner is in possession and objects to the repossession, the repossessor cannot effect repossession and must go to court to seek repossession.

Policy also allowed, and Lieutenant Baca was trained to understand, that parties could legally agree to waive certain rights. A party could agree to allow repossession over his or her objections and thereby waive "due proc-

ess." In his opinion, plaintiff had waived his due process rights in the preferred ship mortgage, so Nicolino Nicoletti did not have to obtain a court order to enforce his rights under the mortgage. Therefore, even though plaintiff objected to repossession by Nicoletti, Lieutenant Baca believed plaintiff's waiver of his due process rights in the preferred ship mortgage gave Nicoletti the right to repossess and board the Magnifico while plaintiff was on the boat and to arrest him for trespassing. Training guide notwithstanding, Lieutenant Baca believed Sheriff's Department policy did not require him to advise Nicoletti to go to court to effect repossession once plaintiff objected.

The lieutenant acknowledged the Sheriff's Department policy manual contained no policies or procedures relative to civil disputes and repossessions. He also had no document or bulletin which changed the guidelines in the training manual that if a person objects to repossession, the repossessor cannot take the property.

Lieutenant Baca had received some training with respect to civil repossessions, but none with respect to enforcement of preferred ship mortgages. He did not understand the difference between federally-documented and state-registered vessels.

PROCEDURAL BACKGROUND

Plaintiff brought this action on October 30, 1978 for deprivation of his property without due process of law, violation of his civil rights within the meaning of 42 United States Code section 1983, trespass and false arrest. Trial was bifurcated, with liability issues to be tried before damages. During trial of liability issues, defendants were granted a nonsuit as to plaintiff's state law claims on the ground of immunity. On June 28, 1984, a mistrial was declared when the jury was unable to reach a verdict. The parties agreed to waive a jury, and the trial court found in favor of plaintiff and against the

county, and in favor of Lieutenant Baca and against plaintiff, on the issue of liability.

Trial then was held on the damages issue. On July 2, 1985, defendant county requested a statement of decision as to the liability determination. The trial court issued a tentative decision covering both liability and damages issues but denied the request for a statement of decision insofar as it requested explanation beyond those set forth in the tentative decision. Defendant county filed another request for a statement of decision, requesting findings on issues of liability and damages. Again, it was denied except as to those issues already addressed in the tentative decision. Defendant county then filed a notice of the court's failure to resolve controverted issues or ambiguities in the tentative decision.

Plaintiff moved to have prejudgment interest inserted in the judgment. This motion was denied without prejudice. Plaintiff renewed it, but it again was denied. Shortly thereafter, judgment was entered; the judgment addressed both liability and damages.

The damages awarded included $3 million for the Magnifico and $516,063 for plaintiff's personal property aboard the boat. The trial court awarded lost profits of $2,483,292 from November 10, 1977 through May 29, 1985, and continuing at $901.36 per day until paid. It also awarded $42,529 for the expenses plaintiff incurred in attempting to recover the Magnifico and $750,000 as general damages for emotional distress and physical and mental suffering.

CONTENTIONS

Defendant's Appeal

I

Defendant County of Los Angeles contends its failure to adopt a policy concerning preferred ship mortgages did not violate plaintiff's constitutional rights and support a

judgment of liability under 42 United States Code section 1983.

II

Defendant further contends plaintiff's losses were not caused by the actions of its Sheriff's Department.

III

Defendant finally asserts the damage award must be reversed, in that it includes improper elements and violates controlling principles.

Plaintiff's Cross-Appeal

IV

Plaintiff contends the trial court's failure to award any prejudgment interest should be taken into account in scrutinizing the damage award and on any remand.

Plaintiff's Appeal

V

Plaintiff asserts the trial court erred in granting defendant Lee Baca qualified official immunity under 42 United States Code section 1983.

VI

Plaintiff additionally asserts the trial court erred in granting defendants immunity under the California Tort Claims Act.

DISCUSSION

I

Defendant's Appeal

Defendant County of Los Angeles contends its failure to adopt a policy concerning preferred ship mortgages did not violate plaintiff's constitutional rights and support a judgment of liability under 42 United States Code section 1983. We disagree.

Preliminarily, we address the propriety of the trial court's denial of defendant's request for a statement of decision. Although defendant makes no contention as to this issue, it is discussed in the parties' briefs and the lack of a statement of decision affects this court's review of the facts.

Pursuant to section 632 of the Code of Civil Procedure, a statement of decision is required only on request of a party made within 10 days after the announcement of a tentative decision. Rule 232 of the California Rules of Court prescribes the procedures for announcing a tentative decision and issuing a statement of decision. Rule 232.5 provides: "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried and shall, when requested pursuant to Code of Civil Procedure section 632, issue a statement of decision as prescribed in rule 232; but no proposed judgment shall be prepared until the other issues are tried . . . ."

Pursuant to the foregoing, when trial is bifurcated and a tentative decision announced as to the first issue to be tried, a statement of decision as to that issue must be requested within 10 days thereafter. A party cannot wait for the remaining issues to be tried then, upon the trial court's issuance of a tenative decision covering those issues, request a statement of decision as to all issues tried.

Here, the trial court made findings on the liability issues on June 28, 1984. Defendant did not request a statement of decision until the court announced its tentative decision on all issues following trial of the damages issues, on July 2, 1985. The request was not timely, therefore the trial court was not required to issue a statement of decision on the liability issues.

Where there is no statement of decision, the appellate court must assume the trial court found every fact necessary to support the judgment. (*Noguchi* v. *Civil Service Com.* (1986) 187 Cal.App.3d 1521, 1536; *Golde* v. *Fox* (1979) 98 Cal.App.3d 167, 174.) We will search the record only to determine whether the judgment is supported by substantial evidence. (*Noguchi*, *supra*, at p. 1536; *Golde*, *supra*, at p. 174.)

Turning now to the issue of liability, 42 United States Code section 1983 (hereinafter section 1983) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." A municipality can be held liable under section 1983 only where the municipality itself causes a violation of the plaintiff's federal constitutional rights. (*Canton* v. *Harris* (1989) 489 U.S. 378, 385.) This occurs " 'when the "execution of the government's policy or custom . . . inflicts the injury." ' " (*Ibid.*) There must be a direct causal connection between the municipality's policy or custom and the violation. (*Ibid.*) And unlike the situation where liability is sought to be imposed on the municipality's employees, there is no qualified immunity available to the municipality based on its good faith. (*Owen* v. *City of Independence* (1980) 445 U.S. 622, 649-650; *Novick* v. *City of Los Anegeles* (1983) 148 Cal.App. 3d 325, 331.)

Even if the policy itself is not unconstitutional, a municipality may be held liable if its failure to train its employees or inadequate training of its employees as to the application of the policy results in a constitutional violation. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 387.) However, liability may be imposed "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact." (*Id.* at p. 388, fn. omitted.) Since liability can be

imposed only where the municipality's policies are the " 'moving force [behind] the constitutional violation,' " only a " 'deliberate indifference' " standard applied to a failure to train will elevate the municipality's shortcoming to " 'policy or custom.' " (*Id.* at p. 389.) The municipality must have made a deliberate or conscious choice to follow a particular alternative in order to be held liable. (*Ibid.*)

While it may seem unlikely a municipality would have a policy of not taking reasonable steps to train its employees, "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the [municipality] can reasonably be said to have been deliberately indifferent to the need." (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 390, fn. omitted.) In such a case, the failure to provide adequate training may be said to represent a policy for which the municipality is responsible and may be held liable if it causes injury. (*Ibid.*)

The adequacy of the municipality's training must be evaluated in light of the tasks assigned to the employee. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 390.) Liability will attach only where the injury would have been avoided had the employee been properly trained. (*Id.* at p. 391.)

It may be noted that while *Canton* v. *Harris*, *supra*, speaks of constitutional rights, section 1983 also applies to rights secured by federal statutory law. (*Maine* v. *Thiboutot* (1980) 448 U.S. 1, 4-8.) And the principles enunciated in *Canton* apply to counties as well as municipalities. (See *Polk County* v. *Dodson* (1981) 454 U.S. 312, 326; *Merritt* v. *County of Los Angeles* (9th Cir. 1989) 875 F.2d 765, 769.)

Here, the parties are in disagreement over whether this is an illegal policy case or a failure to train case. While defendant frames its contention in terms of failure

to adopt a policy concerning preferred ship mortgages, it argues it should not be held liable under section 1983 for its failure to train its deputies concerning preferred ship mortgages. Plaintiff insists this is not a failure to train or failure to adopt a policy case but a case of unlawful policy.

The trial court found "that while Los Angeles [County] Sheriff's Department trains its officers and has a policy generally with respect to the rights of those involved in mortgage transactions and generally with respect to their conduct when responding to scenes of civil disputes, and generally with respect to how to handle repossessions and disputes arising therefrom, nevertheless, their training with respect to the handling of such disputes arising from enforcement of preferred ships mortgages and with respect to Admiralty Law was either nonexistent, or so inadequate as to amount to the Los Angeles County Sheriff's Department's having no understandable policy as to such matters.

"In a situation such as presented here, where the Sheriff's Officers and Harbor Patrol Officers would have to have such information because of their assignment and duty at Marina del Rey, this lack of policy led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights. The Los Angeles County Sheriff's Department knew, or should have known that such results could occur in the absence of a definite and understandable policy."

The foregoing shows the trial court found both a lack of training and a lack of policy regarding repossession under preferred ship mortgages. However, the lack of training resulted from the lack of policy. Thus, this is not a failure to train case, but a case either of a policy which may violate federal statutory law, or of a lack of policy which may "amount[] to deliberate indifference to the rights of persons with whom the [sheriff's deputies]

come into contact" (*Canton* v. *Harris, supra*, 489 U.S. at pp. 385, 388), which resulted in the deprivation of plaintiff's federal statutory rights.

It is admitted the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. Its policy was to treat all civil repossessions alike: The Sheriff's Department was to function in an impartial manner, not taking sides or determining who was right or wrong, but merely ensuring no breach of the peace took place. Generally, repossessions could not be effected if the owner was in personal possession of the property and objected to repossession. However, Lieutenant Baca testified, policy allowed that if the parties agreed to waive their due process rights, repossession could be effected even over the owner's objection.

It is clear to us defendant did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here. The deputies' main goal in the actions they took was to prevent a breach of the peace, but Lieutenant Baca's handling of the situation was colored by his belief plaintiff had waived his due process rights and Nicolino Nicoletti therefore was entitled to immediate possession of the Magnifico, even over plaintiff's objection. There being a policy, the question is whether there is substantial evidence to support the conclusion this policy violated plaintiff's federal statutory rights. (*Canton* v. *Harris, supra*, 489 U.S. at p. 385.)

The rights at issue are those contained within the Ship Mortgage Act of 1920 (46 U.S.C. § 911 et seq.,[3] hereinafter Ship Mortgage Act or Act), which governs preferred ship mortgages (*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle* (N.D.Cal. 1985) 637 F.Supp. 305, 306). The Act provides in pertinent part: "A preferred mortgage shall constitute a lien upon the mortgaged vessel in

[3] The Act was repealed in 1988 (102 Stat. 4752).

the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. . . ." (46 U.S.C. § 951.)

Plaintiff insists this language makes it perfectly clear the mortgagee under a preferred ship mortgage cannot take advantage of self-help repossession upon default, but may only enforce the lien through a suit in rem in admiralty in federal court. Therefore, plaintiff claims, defendant's policy which "authorized police actions that afforded legitimacy to the self-help repossessor" is unlawful and provides a basis for imposition of liability on defendant under section 1983.

The language of the Ship Mortgage Act is not that clear, as evidenced by the different conclusions as to its meaning reached by various courts. In *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star* (5th Cir. 1972) 457 F.2d 815, certiorari denied 409 U.S. 489, it was noted the purpose of the Ship Mortgage Act was to provide a uniform body of maritime law. (At p. 817.) Where there were gaps in the law, state law could be employed, but it could not be employed to contravene the Act or disrupt the uniformity the Act sought to bring. (*Id.* at p. 818.) *Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. 305 similarly held the Ship Mortgage Act applies to all foreclosures on preferred ship mortgages, and a suit to foreclose must be brought in federal court. (At p. 306.) It further held the parties to a preferred ship mortgage could not reserve rights in conflict with the provisions of the Act. (*Id.* at p. 307.) However, *Price* v. *Seattle-First Nat. Bank* (W.D.Wash. 1983) 582 F.Supp. 1568, 1569-1570 suggested that while the Ship Mortgage Act granted exclusive jurisdiction to the federal courts with respect to preferred ship mortgages,

parties to such mortgages could provide for additional contract remedies to those available through the Act, including self-help provisions enforceable in state court.

In *Dietrich* v. *Key Bank, N.A.* (S.D.Fla. 1988) 693 F.Supp. 1112, the issue was whether the Ship Mortgage Act permits parties to a preferred ship mortgage to contractually agree the mortgagee may use state-law self-help procedures to repossess the vessel. (At p. 1114.) The court noted that in *Challenger, Inc.* v. *Durno* (5th Cir. 1956) 227 F.2d 918, it was found such an option was available to the mortgagee. (*Dietrich*, *supra*, at p. 1115.) *Dietrich* held *McDermott* did not overrule *Challenger*, in that it did not involve a contractual agreement between the parties to allow state-law remedies. (*Id.* at p. 1116.) The court concluded state-law self-help was permissible by agreement, based on *Challenger* and declining to follow *Fogle*. (*Id.* at pp. 1116, 1117.) However, in *Nate Leasing Co., Inc.* v. *Wiggins* (1990) 114 Wash.2d 508 [789 P.2d 89], it was concluded that given the history and purpose of the Ship Mortgage Act, *Fogle* appeared to be better reasoned than *Dietrich*, and the Act allows no room for state law in foreclosure on a preferred ship mortgage. (789 P.2d at pp. 94-95.)

It may be noted *Challenger, Inc.* v. *Durno*, *supra*, 227 F.2d 918, on which *Dietrich* relied, did not discuss or analyze the question whether the Ship Mortgage Act allowed state-law self-help procedures to repossess a vessel subject to a preferred ship mortgage. *Challenger* simply stated that the mortgagee could effect a private foreclosure or foreclosure under the preferred ship mortgage. (At p. 922.)

In *Fogle*, plaintiff conceded the Ship Mortgage Act controlled foreclosure on a preferred ship mortgage but contended the Act was silent as to whether mortgagees could conduct private foreclosure sales, therefore a mortgagee was free to contractually reserve the right to do so.

(*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. at p. 306-307.) The court noted the Act made provision for judicially-approved private sales. (*Id.* at p. 307.) It concluded, by providing a specific, detailed procedure for doing so, the statute was hardly silent on the question, and "Congress obviously meant to disapprove of extrajudicial private sales. There is, therefore, 'simply no room for the operation of state law' on the issue of whether extrajudicial private sales are permissible." (*Ibid.*) Thus plaintiff had no right to conduct a private foreclosure sale pursuant to state law. (*Ibid.*)

Nate Leasing Co., Inc. v. *Wiggins*, *supra*, 789 P.2d 89, in analyzing *Dietrich* and *Fogle*, first discussed the history of the Ship Mortgage Act. Citing *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star*, *supra*, 457 F.2d at pages 817-818, the court noted prior to the enactment of the Ship Mortgage Act, ship mortgages could not be foreclosed in admiralty and so were "practically worthless." (*Nate Leasing Co., Inc.*, *supra*, at p. 91.) In order to promote the merchant marine and encourage shipping, the Act was passed; it gave preferred status to mortgagees and brought foreclosure on preferred ship mortgages within the admiralty jurisdiction of the federal courts. (*Ibid.*) It was the intent of the drafters to provide speedy and uniform procedures for foreclosure, so "'the Act would wholly and completely supersede state law and practice in every respect.'" (*Ibid.*, quoting from *J. Ray McDermott & Co., Inc.*, *supra*, at p. 818.)

With this history as a backdrop, the court addressed the question whether the Ship Mortgage Act allowed "[t]he utilization of state law self-help procedures to take possession of and sell a ship covered by a preferred ship mortgage" (*Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at p. 92). The court found only four cases dealing with the question. One was *Price* v. *Seattle-First Nat. Bank*, *supra*, 582 F.Supp. 1568, two others were *Fogle* and *Dietrich*. The fourth was *Brown* v. *Baker*

(Alaska 1984) 688 P.2d 943, in which "the court found that, because the vessel was voluntarily returned to the mortgagee after default, there was 'no foreclosure action and therefore the Ship Mortgage Act [was] inapplicable.'" (*Nate Leasing Co., Inc., supra*, at pp. 92, 93, emphasis omitted.) In the view of the court in *Nate Leasing Co., Inc.*, the Alaska court in *Brown* "seem[ed] to be saying that parties who avail themselves of the protection of a preferred ship mortgage may nonetheless render the statute inapplicable simply by choosing not to follow the procedures set forth in the statute." (*Id.* at p. 93.)

The four cases cited varied in reasoning and result. Of the four, the court found *Fogle* the best reasoned, relying on the strong statements in *J. Ray McDermott & Co., Inc.* v. *Vessel Morning Star*, *supra*, 457 F.2d 815 regarding congressional intent that the Ship Mortgage Act provide uniform procedures for foreclosure on vessels subject to preferred ship mortgages. (*Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at pp. 94-95.) Thus, the court concluded there was no room for state law in the foreclosure of a preferred ship mortgage but the Ship Mortgage Act provided the exclusive remedy. (*Id.* at p. 95.)

We agree with both the reasoning and holding of *Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d 89. Allowing parties to a preferred ship mortgage to reserve rights under state law defeats the purpose of the Ship Mortgage Act—to provide for exclusive jurisdiction of the admiralty court and uniform procedures for foreclosure proceedings. We further conclude this reasoning applies not only to foreclosures under state law, but to self-help repossession as well. Allowing such actions would also defeat the goal of having uniform procedures on which the parties to a preferred ship mortgage—or their successors in interest—can rely in the event of a default.

Accordingly, in this case, Nicolino Nicoletti had no right to take advantage of self-help repossession upon any default in the terms of the preferred ship mortgage on the Magnifico. Plaintiff had the federal statutory right not to have the boat taken from him unless the procedures set forth in the Ship Mortgage Act were complied with, which did not occur. Therefore, defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having him go through "due process," violated plaintiff's federal statutory rights. This being the case, defendant may be held liable for the violation under section 1983. (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 385.)

Defendant claims there cannot be anything unlawful about a policy of keeping the peace in the same manner, regardless of the type of property in dispute, and it cannot be faulted for refusing to ignore a potentially violent confrontation over a preferred ship mortgage. If defendant's policy were simply to keep the peace, this claim would have merit. However, defendant's policy, and the actions taken to effect it, went beyond mere peacekeeping. The policy included assisting in self-help repossessions where it was determined one party to the mortgage had waived "due process" and the right to object to the repossession. In the case of a preferred ship mortgage, such a waiver is not valid and there is no right to self-help repossession. But here the waiver was given effect and defendant's employees assisted in the self-help repossession by forcing plaintiff to bring the Magnifico back to the dock, by forcing him and his security guard off the boat, and by allowing the Nicolettis to place their guard on the boat and refusing to allow plaintiff or his wife to return to the boat. Since defendant's policy and actions went beyond mere peacekeeping, it cannot escape liability.

Defendant further claims it cannot be held liable under section 1983 for merely enforcing state law regarding keeping the peace in civil disputes, citing, following oral

argument, *Surplus Stove and Exchange, Inc.* v. *City of Delphi* (7th Cir. 1991) 928 F.2d 788, 791-792. Again, since defendant's policy and actions went beyond peacekeeping, defendant was not merely enforcing state law. Moreover, as plaintiff points out, a county may be found liable under section 1983 for merely enforcing state law where to do so violates federal constitutional or statutory rights. (See *Howlett by and Through Howlett* v. *Rose* (1990) —— U.S. ——, —— [110 S.Ct. 2430, 2443]; *Evers* v. *County of Custer* (9th Cir. 1984) 745 F.2d 1196, 1203.)

Defendant also suggests, in any event, plaintiff cannot claim on appeal this is an unlawful policy case, in that plaintiff claimed at trial it was a failure to train case. However, the record shows plaintiff argued both theories to the jury. The parties also cite various parts of the record in support of their claims this is or is not a failure to train or unlawful policy case. The informal statements by the trial court on which they rely are not the judgment and cannot be used to contradict or "interpret" an unambiguous judgment. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 5, pp. 455-456; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 264, p. 271.) The judgment is clear the trial court found a "lack of policy [which] led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights." It also found a lack of or inadequate training, but that lack or inadequacy was simply a result of the lack of policy. Inasmuch as the judgment is clear, the trial court's informal statements canont be used to contradict or explain it.

II

Defendant further contends plaintiff's losses were not caused by the actions of its Sheriff's Department. Again, we disagree.

Defendant first argues that even if its deputies had been properly trained regarding preferred ship mort-

gages, they would have taken the same actions in order to prevent a breach of the peace; therefore, any deficiencies in the training did not cause plaintiff's injuries (*Canton* v. *Harris*, *supra*, 489 U.S. at p. 385). As discussed in part I, *ante*, this case cannot be treated simply as a failure to train case but must be viewed as a case involving an unlawful policy. Additionally, the actions of the deputies were designed not only to prevent a breach of the peace but also to assist Nicolino Nicoletti in repossessing the Magnifico.

If defendant's policy on repossessions had recognized that there can be no self-help repossession under a preferred ship mortgage but the mortgagee must seek relief in the admiralty court, and if defendant's training of its deputies reflected this policy, it is reasonable to conclude the deputies would not have had the Harbor Patrol bring plaintiff back to the dock when he sought to take the Magnifico out to sea to avoid the attempted repossession. Neither would they have forced defendant and his security guard off the boat or refused to allow defendant and his wife to return to the boat and allowed the Nicolettis to place their security guard on the boat once the meeting with the Nicolettis had taken place. Had they not taken the foregoing actions, plaintiff would have retained possession of the Magnifico and avoided his injuries.

Defendant next argues the judicial determination in the action plaintiff brought against the Nicolettis that plaintiff was not entitled to possession of the Magnifico, when the court in December 1977 denied plaintiff a temporary restraining order and preliminary injunction transferring possession back to him, cut off any potential liability of defendant. Citing *Novick* v. *City of Los Angeles*, *supra*, 148 Cal.App.3d at pages 332-333, defendant claims the court's independent exercise of its judgment severed the chain of causation between any section 1983 violation and any subsequent damage to the Magnifico.

However, *Novick* is distinguishable. In *Novick*, the section 1983 violation was an illegal search by police officers and the injury was the filing of criminal charges by the city prosecutor. The court concluded the chain of causation between the two was severed by the exercise of the prosecutor's independent judgment in deciding to file the criminal charges. (*Novick* v. *City of Los Angeles*, *supra*, 148 Cal.App.3d at pp. 332-323.) Here, by contrast, the exercise of the court's independent judgment in the Nicoletti action did not cause plaintiff's injury but merely failed to prevent exacerbation of an injury which already had occurred. Defendant does not argue this type of failure breaks the chain of causation.

Defendant finally claims it cannot be held responsible for damages caused by the unforseeable acts and omissions of third parties—the Nicolettis. No special relationship existed between it and plaintiff requiring it to protect plaintiff's property against damage by the Nicolettis, and it cannot be held liable for damage and deterioration occurring a significant period of time after the acts upon which its liability was based.

One may be held liable if his conduct is "a substantial fatcor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his . . . conduct. [Citation.] Moreover, if the likelihood that a third person may act in a particular manner, whether innocent, negligent, intentionally tortious, or even criminal, is one of the hazards which makes the actor['s conduct wrongful,] the actor will remain liable for the harm caused by that [conduct]. [Citation.]" (*Earp* v. *Nobmann* (1981) 122 Cal.App.3d 270, 292-293, disapproved on other grounds in *Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 219; accord, *Vesely* v. *Sager* (1971) 5 Cal.3d 153, 163.)

Here, plaintiff told Lieutenant Baca the Nicolettis were criminals, they previously had attempted to take the Mag-

nifico from him using forged documents and they had obtained the preferred ship mortgage through coercion. He also said he had personal property on the boat for which he wanted protection. Under these circumstances it was reasonably foreseeable the Nicolettis would convert, damage or destroy the boat and plaintiff's other property if given the opportunity to do so. Moreover, the only reason the Nicolettis were able to do so was through Lieutenant Baca's conduct; had he allowed plaintiff to remove the boat from danger, the Nicolettis would not have been able to take possession of the boat. Accordingly, defendant may be held liable for the damage to the boat and plaintiff's property by the Nicolettis. (*Earp* v. *Nobmann, supra*, 122 Cal.App.3d at pp. 292-293.)

As to the deterioration of the Magnifico occurring while the Nicolettis were in possession of the boat, it is fundamental an injured party should be compensated for all damage proximately caused by a wrongdoer. (*Curlender* v. *Bio-Science Laboratories* (1980) 106 Cal.App.3d 811, 830.) Damage proximately caused by a wrongdoer may include damage caused by the elements. See *Poulsen* v. *Charlton* (1964) 224 Cal.App.2d 262, 270.) Defendant's actions allowed the Nicolettis to take the Magnifico from plaintiff and prevented plaintiff from having the necessary maintenance performed, which in turn allowed the boat to deteriorate due to exposure to the elements. Defendant cites no authority to support its argument this deterioration was not proximately caused by the actions of its sheriff's deputies. Accordingly, defendant properly was held liable for this damage. See *People* v. *Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

III

Defendant finally asserts the damage award must be reversed, in that it includes improper elements and violates controlling principles. While the assertion has some

merit, defendant has not demonstrated entitlement to relief.

The level of damages to be awarded in a section 1983 action is determined according to common law principles, which are designed to provide " 'compensation for the injury caused to plaintiff by defendant's breach of duty.' " (*Memphis Community School Dist.* v. *Stachura* (1986) 477 U.S. 299, 306, emphasis omitted.). (*Compensation for the injury* is the key to determining whether the level or an element of damages is appropriate. (*Id.* at p. 307.) This compensation may include out-of-pocket expenses, other monetary damages, and damages for mental anguish and suffering. (*Ibid.*)

In making the determination as to the damages to be awarded a plaintiff pursuant to section 1983, the court should look first to federal law and, if necessary, then to state law. (*Gilmere* v. *City of Atlanta, Ga.* (11th Cir. 1989) 864 F.2d 734, 737-739, cert. den. —— U.S. —— [107 L.Ed.2d 37]; see 42 U.S.C. § 1988.) The key to deciding which law to apply is determining which law will better serve the policy expressed in section 1983 of compensating the plaintiff for the actual injuries suffered. (*Gilmere, supra,* at p. 739.)

Defendant challenges the award of damages here in several aspects. First, it contends the judgment in plaintiff's action against the Nicolettis collaterally estops plaintiff from obtaining a higher award against it in this action. Plaintiff claims defendant waived this contention by failing to raise the issue below. However, the record shows the trial court took judicial notice of the proceedings in the Nicoletti action, and defendant argued its collateral estoppel theory to the trial court. Accordingly, the contention is not waived for failure to raise it below. (See *Dimmick* v. *Dimmick* (1962) 58 Cal.2d 417, 422-423.)

Collateral estoppel bars relitigation of all factual issues actually litigated and necessarily decided in prior litigation. *Alhino* v. *Starr* (1980) 112 Cal.App.3d 158, 170; *Americana Fabrics, Inc.* v. *L. & L. Textiles, Inc.* (9th Cir. 1985) 754 F.2d 1524, 1529.) It may be applied if the issues decided in the prior adjudication are identical to those raised in the present action, there was a final judgment on the merits in the prior adjudication, and the party against whom the doctrine is sought to be applied was a party to the prior adjudication. (*Clemente* v. *State of California* (1985) 40 Cal.3d 202, 222.) It also may be applied to a section 1983 action. (*Allen* v. *McCurry* (1980) 449 U.S. 90, 96-105; *Novick* v. *City of Los Angeles, supra*, 148 Cal.App.3d at p. 331.)

If an issue decided in the Nicoletti action was the extent of plaintiff's damages resulting from the loss of the Magnifico and the extent of the damage to the Magnifico itself, and this same issue arose in the instant action, the issues are identical. One of the issues to which collateral estoppel may be applied is the extent of damages. (*Klinell* v. *Shirey* (1963) 223 Cal.App.2d 239, 244; see, e.g., *Ellena* v. *State of California* (1977) 69 Cal.App.3d 245, 254.)

The parties originally characterized the judgment in the Nicoletti action as a default judgment.[4] For the purpose of applying collateral estoppel, it is a final judgment on the merits. (*Kahn* v. *Kahn* (1977) 68 Cal.App.3d 372, 382; *Martin* v. *General Finance Co.* (1966) 239 Cal.App. 2d 438, 443.) A default judgment " 'is as conclusive as to the issues tendered by the complaint as if it had been ren-

[4] Following oral argument, we requested letter briefs from the parties addressing the collateral estoppel issue. In its brief, defendant characterizes the judgment in the Nicoletti action as a summary judgment. Comments by plaintiff's trial counsel suggest there was a default, but the prove-up of damages was on a summary judgment motion. Plaintiff does not contend collateral estoppel would not apply to a summary judgment.

dered after answer filed and trial had on allegations denied by the answer.'" (*Ibid.*; *Mitchell* v. *Jones* (1959) 172 Cal.App.2d 580, 586.)

Plaintiff was a party to the Nicoletti action. While defendant was not, this does not defeat application of collateral estoppel. The doctrine may be asserted offensively by one not a party to the prior action. (*Bernhard* v. *Bank of America* (1942) 19 Cal.2d 807, 811-812; *Mountain Home Properties* v. *Pine Mountain Lake Assn.* (1982) 135 Cal.App.3d 959, 964.) The elements of collateral estoppel being met here, it properly could have been applied to the trial court's decision with respect to the amount of damages suffered by plaintiff.

Plaintiff asserts, without citation to any authority (see *People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283), collateral estoppel should not be applied, in that, because the prior action involved a default judgment, "he had no incentive to fully develop damages evidence (because he predicted, correctly, that the Nicolettis could not pay any substantial judgment)." Further, the issues in the two cases are not identical: the Nicoletti action involved only a prove-up of the default, proof plaintiff's damages were at least what he claimed they were: Finally, application of collateral estoppel would seriously undermine the policies behind section 1983 by denying him compensation from a government entity which violated his rights "merely because [he] had previously 'won' an empty judgment against a joint tortfeasor."

These assertions are devoid of merit. That the judment in the Nicoletti action was the result of a default is of no significance; it is treated the same as a judgment on the merits following trial (*Martin* v. *General Finance Co.*, *supra*, 239 Cal.App.2d at p. 443). Plaintiff points to no evidence he failed to fully develop damages evidence at the default prove-up because he predicted the Nicolettis would not be able to pay any substantial judgment. Moreover, plaintiff's failure to raise certain matters in the

Nicoletti action action would not defeat the application of collateral estoppel to those issues he actually litigated. "[O]nce an issue is litigated and determined, it is binding in a subsequent action notwithstanding that a party may have omitted to raise a matter for or against it which, if asserted, might have produced a different outcome." (*Alhino* v. *Starr*, *supra*, 112 Cal.App.3d at p. 170; *Kingsbury* v. *Tevco, Inc.* (1978) 79 Cal.App. 314, 318.)

Additionally, we hardly consider an award of $3,766,055 to be "an empty judgment." And it appears as though there might be some damages issues which were not litigated in the Nicoletti action which could have resulted in an additional award to plaintiff. Thus, the policies behind section 1983 are not seriously undermined by application of collateral estoppel in this case. (See *Mountain Home Properties* v. *Pine Mountain Lake Assn.*, *supra*, 135 Cal.App.3d at pp. 964-965.)

As previously mentioned, collateral estoppel properly could have been applied on the issue of damages.[5] However, defendant has failed to establish the facts foundational to application of collateral estoppel—the damages issues actually litigated in the Nicoletti action and, specifically, which items of damages were included in the $3.75 million award of special damages in that action. Defendant merely speculates as to which items must have been included.

We examined the superior court file in the Nicoletti action, of which both we and the trial court took judicial notice, but it provides no illumination. It indicates all exhibits on the damages issues were returned to plaintiff; there are no copies in the file. Neither is there a reporter's transcript of the hearing on the prove-up.

Absent evidence establishing which items of damages were included in the award in the Nicoletti action, neither

[5] Neither the judgment nor the statement of decision gives any indication whether the trial court did so.

we nor the trial court can actually apply collateral estoppel to the judgment. Defendant having failed to meet its burden of proof on this issue (Evid. Code, § 500), there would be no error in the trial court's failure to apply collateral estoppel, if indeed it did fail to do so. Defendant also having failed to meet its burden on appeal of demonstrating error, it is not entitled to relief based on the application of collateral estoppel. (*People* v. *Clifton* (1969) 270 Cal.App.2d 860, 862.)

Defendant also contends the damages award does not take into account plaintiff's duty to mitigate damages (*Murphy* v. *City of Flagler Beach* (11th Cir. 1988) 846 F.2d 1306, 1308-1309). Defendant argues: "By selling his business to Fischer, plaintiff . . . abandoned any claim for profits he could have earned had he continued operating a recording studio or charter boat business. [¶] Concededly, [plaintiff] testified he could not work after losing the [Magnifico]." The reason for this was his full-time occupation with the litigation. "In other words, [plaintiff] decided not to mitigate his damages so he could spend more time trying to recover damages." This does not relieve plaintiff of the duty to mitigate; moreover, plaintiffs in civil rights cases are entitled to attorneys fees, which plaintiff recovered, so it was not necessary that he spend all his time on the litigation.

Defendant neglects to mention that not all of plaintiff's litigation efforts were part of his civil rights action; some were aimed at recovering the Magnifico. Further, once plaintiff did recover the boat, it was in no condition to enable him to continue his business and plaintiff may not have had the financial ability to restore it to its former condition. Defendant cites nothing in the record and no authority to show the issue of mitigation was raised below and erroneously ruled upon by the trial court. Therefore, this contention has been waived on appeal. (*People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283.)

Defendant next contends plaintiff's award of damages for emotional distress included improper elements, in that it awarded plaintiff damages for distress caused by the actions of the Nicolettis, not defendant; defendant acknowledges damages for emotional distress properly may be awarded in a section 1983 action (*Memphis Community School Dist.* v. *Stachura*, *supra*, 477 U.S. at p. 307). In view of the conclusion reached in part II, *ante*, regarding causation, this contention is without merit, and defendant has not demonstrated the award of damages for emotional distress included any improper elements.

Defendant finally contends the award of interest on the continuing award of lost profits effects a double recovery for plaintiff. The judgment awarded plaintiff lost profits of $2,483,292.60 through May 29, 1986, "and continuing on a daily basis until paid, in the amount of $901.36 per day." It also awarded "interest on the above-mentioned sum at the rate of 10% per annum."

Defendant does not explain how awarding 10 percent interest on the unpaid lost profit awards effects a double recovery rather than making plaintiff whole for the lost profits and the lost opportunity of investing those profits. Defendant originally cited no authority in support of its contention, rendering this contention without merit and effectively waived as well (*People* v. *Dougherty*, *supra*, 138 Cal.App.3d at pp. 282-283). Following oral argument, defendant submitted a citation in support of its contention—*Estate of de Laveaga* (1958) 50 Cal.2d 480, 489. In *Estate of de Leveaga*, a trustee wrongfully withheld predistribution income from a beneficiary, instead treating the income as corpus. (*Ibid.*) The court held that, under these circumstances, the beneficiary was not entitled to both the earnings on the income and interest on it. (*Ibid.*) This holding has no application here, where the "income"—lost profits—was not earning money for plaintiff during the time period for which he sought interest.

Plaintiff's Cross-Appeal

IV

Plaintiff contends the trial court's failure to award any prejudgment interest should be taken into account in scrutinizing the damage award and on any remand. The contention lacks merit.

Preliminarily, defendant claims plaintiff failed to appeal from the trial court's order denying his motion to insert prejudgment interest. While plaintiff's May 13, 1986 notice of appeal does not mention the order, his May 28, 1986 notice of cross-appeal does, so the court may consider his contention.

Defendant also asks that this contention be deemed waived, in that plaintiff failed in his opening brief to provide any authority or analysis in its support. Such a failure ordinarily waives a contention on appeal. (*Balboa Ins. Co.* v. *Aguirre* (1983) 149 Cal.App.3d 1002, 1010; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 496, pp. 484-485.) However, this rule may be relaxed for good reason, especially in view of the fact the court is free to consider points not even raised in the briefs. (*Id.* at p. 485; see *Burns* v. *Ross* (1923) 190 Cal. 269, 275-276.) Thus, we may consider plaintiff's contention.

Although neither section 1983 nor section 1988 of 42 United States Code mandates an award of prejudgment interest, the trial court may, in a section 1983 action, exercise its discretion to award prejudgment interest when necessary to fully compensate the plaintiff. (See *Heritage Homes of Attleboro* v. *Seekonk Water Dist.* (1st Cir. 1981) 648 F.2d 761, 764, vacated on other grounds 454 U.S. 807; *Pressey* v. *City of Houston* (S.D.Tex. 1988) 701 F.Supp. 594, 596, affd. *sub. nom. Pressey* v. *Patterson* (5th Cir. 1990) 898 F.2d 1018, 1026; cf. *Leaf* v. *City of San Mateo* (1984) 150 Cal.App.3d 1184, 1191; *Orme* v. *State of California ex rel. Dept. Water Resources* (1978) 83 Cal.App.3d 178, 186.) However, the trial court may deny prejudgment interest where lost interest was con-

sidered in the damage award, which may be indicated in the size of the award. (See *Landes Const. Co., Inc.* v. *Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365, 1375; *Leaf, supra,* at pp. 1191-1192.)

Here, the record shows the trial court denied without prejudice plaintiff's motion to insert prejudgment interest. He renewed the motion, and it was again denied. The record does not reveal the reason for the denial, whether it was procedural or based on the merits of the motion, whether the trial court had taken lost interest into account in making the damage award, or what factors the trial court considered in denying the motion. Thus it is difficult to tell whether the trial court abused its discretion in denying the motion. In view of the fact it is plaintiff's burden to demonstrate by the record the claimed abuse of discretion, and in the absence of such a demonstration all presumptions and intendments are in favor of the regularity of the trial court's action (*People* v. *Clifton, supra,* 270 Cal.App.2d at p. 862), we conclude plaintiff has failed to demonstrate an abuse of discretion in denying his motion for prejudgment interest and the order denying the motion should be affirmed.

Plaintiff's Appeal

V

Plaintiff asserts the trial court erred in granting defendant Lee Baca qualified official immunity under 42 United States Code section 1983. We disagree.

Preliminarily, defendants contend this appeal should be dismissed, in that plaintiff disregarded key rules of appellate practice. First, plaintiff did not include a statement of facts with citations to the record in his opening brief, as required by the California Rules of Court, rules 13 and 15; instead, plaintiff indicated he would include a statement of the case in his respondent's brief in defendant county's appeal and at one point referred to his trial brief. This failure, defendants claim, hampered their ability to respond to plaintiffs' contentions.

As will be discussed *post*, questions of immunity are questions of law, and they do not require the extensive factual discussion that is required for review of questions of fact. Review of defendants' respondents' brief indicates they were able to effectively address plaintiff's assertions on appeal, and our review of these assertions was not hampered by any failure to fully comply with rules 13 and 15. Therefore, while plaintiff's opening brief may not have complied with the rules governing appellate briefing and is hardly a model brief, we decline to dismiss the appeal due to this failure.

Second, defendants point out plaintiff referred to a supposed error concerning a denial of discovery without citation to the record or any authority, and they claim any contention regarding this error should therefore be deemed waived. Inasmuch as plaintiff actually makes no contention regarding any error but merely brings the discovery issue up in passing in a footnote, we would not have even considered addressing it as a contention on appeal. Of course, as a contention, it would be waived. (9 Witkin, Cal. Procedure, *supra*, Appeal, § 479, pp. 469-471.)

Turning now to the merits of plaintiff's appeal, the trial court ruled, "[w]ith respect to Defendant Baca, . . . because of a lack of proper training in the handling of the kind of situation that confronted him on November 10, 1977, defendant Baca did not fully appreciate or understand that situation, and though handling it improperly, did so in good faith, believing that Nicoletti was entitled to the things that he was demanding on the scene. [¶] This being the case, he should be granted governmental immunity."

Government officials are generally entitled to qualified or "good faith" immunity from civil suits under federal law. (*Harlow* v. *Fitzgerald* (1982) 457 U.S. 800, 806-807.) Good faith has both objective and subjective aspects to it; the objective aspect "involves a presumptive knowl-

edge of and respect for 'basic, unquestioned constitutional rights,' " while the subjective aspect "refers to 'permissible intentions.' " (*Id.* at p. 815.) Thus, good faith immunity will be denied if the official " 'knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . . .' " (*Ibid.*, emphasis omitted.) These principles of good faith immunity apply to law enforcement officers sued under section 1983. (*Malley* v. *Briggs* (1986) 475 U.S. 335, 340.)

The objective reasonableness of an officer's action is measured by reference to clearly established law. (*Harlow* v. *Fitzgerald*, *supra*, 457 U.S. at p. 818.) Where the law is clearly established, and no reasonably competent officer would agree the action should be taken, good faith immunity will be denied. (*Malley* v. *Briggs*, *supra*, 475 U.S. at p. 341.) Where officers of reasonable competence could disagree on the issue, immunity will be recognized. (*Ibid.*)

The question whether immunity may be granted is separate from the merits of the plaintiff's case. (*Mitchell* v. *Forsyth* (1985) 472 U.S. 511, 527-528.) It is purely a legal question, thus the appellate court reviewing a trial court's grant of immunity need not examine the merits of the case but need only determine whether, as a matter of law, "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." (*Id.* at p. 528 and fn. 9.)

As previously discussed, the law regarding self-help repossession of a boat pursuant to a preferred ship mortgage under the Ship Mortgage Act was not clearly established. The language of the Act makes no reference to such repossessions, there are cases which hold the parties to a preferred ship mortgage may contract to allow self-

help repossession or other state-law remedies (*Dietrich* v. *Key Bank, N.A.*, *supra*, 693 F.Supp. at pp. 1116, 1117; *Price* v. *Seattle-First Nat. Bank*, *supra*, 582 F.Supp. at pp. 1569-1570), and there are cases which suggest the entire field was preempted by the Ship Mortgage Act and no state-law remedies are available to the mortgagee (*Bank of America Nat. Trust and Sav. Ass'n* v. *Fogle*, *supra*, 637 F.Supp. at p. 307; *Nate Leasing Co., Inc.* v. *Wiggins*, *supra*, 789 P.2d at pp. 94-95). Therefore, we cannot conclude Lieutenant Baca violated any clearly established laws regarding self-help repossession under a preferred ship mortgage, and he thus was entitled to good faith immunity on that ground.

VI

Plaintiff additionally asserts the trial court erred in granting defendants immunity under the California Tort Claims Act. Again, we disagree.

The Government Code provides, "[e]xcept as otherwise provided by statute . . . [a] public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." (§ 815, subd. (a).)[6] However, "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would [otherwise] have given rise to a cause of action against that employee or his personal representative." (§ 815.2, subd. (a).) If the employee is immune from liability, the public entity likewise is immune. (*Id.*, subd. (b).)

As to an employee, the Government Code provides, "[e]xcept as otherwise provided by statute . . ., a public employee is liable for injury caused by his act or omission to the same extent as a private person." (§ 820,

[6] All further statutory references are to the Government Code.

subd. (a).) However, again "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." (§ 820.2.)

Plaintiff claims once sheriff's deputies, including Lieutenant Baca, made their discretionary decision to become involved in the dispute over the ownership of the Magnifico, their actions became purely ministerial and they were no longer immune from liability therefor under section 820.2. They may be liable for conversion of plaintiff's boat, for which there is no immunity, therefore the county also may be held liable under section 815.2, subdivision (a).

Thus, the key question is whether Lieutenant Baca's challenged actions were discretionary or ministerial. If discretionary, there is no liability. If ministerial, liability may attach.

In determining whether an action is discretionary or ministerial, the courts must look beyond a literal definition of "discretionary"; in a sense, most actions involve a certain amount of discretion. (*Johnson* v. *State of California* (1968) 69 Cal.2d 782, 788-790.) The policy behind the provision of immunity for discretionary acts is "the preservation of ardor in the performance of public duties" by protecting public employees "from the spectre of extensive personal tort liability." (*Id.* at pp. 790-791.) Therefore it has been recognized that many of the actions taken by public employees must be beyond the scope of judicial review in order not to chill the decision-making process in other branches of government. (*Id.* at p. 793.) For this reason, discretionary actions have been held to be those involving "basic policy decisions." (*Ibid.*, emphasis omitted.) And, "[a]ccordingly, to be entitled to immunity [the employee must show] that such a policy

decision, consciously balancing risks and advantages, took place." (*Id.* at pp. 794-795, fn. 8.)

Defendants claim Lieutenant Baca's actions fall within the definition of discretionary, relying on *Watts* v. *County of Sacramento* (1982) 136 Cal.App.3d 232. In *Watts*, plaintiffs entered into an agreement to grow and harvest crops on another's land. When they attempted to harvest the crops, the owner ordered them off the property and requested assistance from the county Sheriff's Department in ejecting them. The owner informed the officers he was the owner of the property and plaintiffs had no legal right to be there. The officers instructed plaintiffs to leave the property, under threat of arrest; they obeyed, and the owner converted the crops to his own use. (At p. 234.)

Plaintiffs took the position once the officers "decided" to intervene in the dispute, any subsequent actions taken by them were ministerial. (*Watts* v. *County of Sacramento*, *supra*, 136 Cal.App.3d at p. 235.) The court found "no legal basis" for that position. (*Ibid.*) It noted that in order to settle the dispute between plaintiffs and the owner, "the officers were obliged to exercise their discretion after they had observed what was happening and had listened to the explanation of those present." (*Ibid.*) The court concluded their decision as to what action to take thereafter was an exercise of their judgment and discretion for which they should not be held liable. (*Id.* at pp. 234, 235.)

Plaintiff in the instant case takes a similar position to that taken by plaintiffs in *Watts*. He states his "claim concerns what the County officers on the scene, including defendant Baca, did *after* they made their discretionary decision to become involved in the dispute over ownership of [his] ship. [He] alleges that the officers clearly violated state procedures by taking possession of his ship without a valid court order backing them up, and are

therefore liable for the strict liability tort offense of conversion." (Emphasis in the original.)

As in *Watts*, it could be said that once Lieutenant Baca made the decision to become involved in the dispute between plaintiff and the Nicolettis—as he could hardly fail to do given the potential for a breach of the peace—he was "obliged to exercise [his] discretion after [he] had observed what was happening and had listened to the explanation of those present." (136 Cal.App.3d at p. 235.) He made a policy decision to enforce the terms of the preferred ship mortgage, which appeared valid on its face and appeared to him to give Nicolino Nicoletti the right to repossess the Magnifico over plaintiff's objections rather than to follow the general policy of noninvolvement in ownership disputes. This was a discretionary decision for which he—and thus the county—was immune from liability. (*Johnson* v. *State of California*, *supra*, 69 Cal.2d at p. 793; see Gov. Code, §§ 820.2, 815.2, subd. (b).)

However, it also could be said Lieutenant Baca's actions following his decision to become involved in the dispute were ministerial, in that the basic policy decisions regarding involvement in attempted repossessions had been made by the Sheriff's Department, and his role was only to carry out that policy—to function in an impartial manner, keep the peace and enforce the laws. He did not have to "consciously balanc[e] risks and advantages." (*Johnson* v. *State of California*, *supra*, 69 Cal.2d at pp. 794-795, fn. 8) but merely act in accordance with predetermined policies. Thus his actions were not discretionary, but ministerial, and neither he nor the county was immune from liability. (Gov. Code, §§ 820.2, 815.2, subd. (a).)

Of the two alternatives given above, the former one appears to us to be correct—that Lieutenant Baca's actions were discretionary. When he saw the preferred ship mortgage he read it, interpreted it, and made the

decision to aid its enforcement. He later made the decision to have the Harbor Patrol bring the Magnifico back to the dock when plaintiff attempted to leave the harbor to avoid repossession. At the dock, he made the decision to get plaintiff, his wife and his guard off the Magnifico and take them to the station to discuss the situation. He subsequently made the decision not to allow them back on the boat until after the ownership dispute had been resolved by the courts. In making each of these decisions, Lieutenant Baca had to exercise his discretion in determining the course of action to take; there was no preset course of action which he simply followed. Accordingly, his actions having been discretionary, he—and therefore the county—was entitled to immunity from liability under state law for those actions. Hence, the trial court did not err in granting a nonsuit on plaintiff's state law causes of action.

The judgment and orders are affirmed.

CERTIFIED FOR PUBLICATION

SPENCER, P.J.

We concur:

DEVICH, J.

ORTEGA, J.

APPENDIX B

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No.: WE C 56172

RICHARD MEILICKE, a/k/a RICHARD COMPTON, *et al.*,
Plaintiffs,

vs.

COUNTY OF LOS ANGELES, *et al.*,
Defendants.

[Filed Feb. 14, 1986]

This case came on regularly for Trial in Department 38 of the above entitled Court, the Honorable Robert C. Nye, Judge Presiding, sitting without a Jury, the Jury having been duly waived. Plaintiffs appeared by their attorneys, Rodney T. Lewin, of Fred, Lewin & Behesnilian, and Robert D. Newman. Defendant appeared by its attorney, Owen Gallagher, County Counsel. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision:

THE COURT ORDERED, ADJUDGED AND DECREED that:

With respect to Defendant Baca, the Court finds that because of a lack of proper training in the handling of the kind of situation that confronted him on November

10, 1977, defendant Baca did not fully appreciate or understand that situation, and though handling it improperly, did so in good faith, believing that Nicoletti was entitled to the things that he was demanding on the scene.

This being the case, he should be granted governmental immunity. Therefore, the Court finds for Defendant Baca and against Plaintiff Richard Compton.

With respect to the defendant County of Los Angeles, the Court finds that while Los Angeles Sheriff's Department trains its officers and has a policy generally with respect to the rights of those involved in mortgage transactions and generally with respect to their conduct when responding to scenes of civil disputes, and generally with respect to how to handle repossessions and disputes arising therefrom, nevertheless, their training with respect to the handling of such disputes arising from enforcement of preferred ships mortgages and with respect to Admiralty Law in such situations was either nonexistent, or so inadequate as to amount to the Los Angeles County Sheriff's Department's having no understandable policy as to such matters.

In a situation such as presented here, where the Sheriff's Officers and Harbor Patrol Officers would have to have such information because of their assignment and duty at Marina del Rey, this lack of policy led directly to the deprivation of the property of the plaintiff, and thus, to a violation of his constitutional rights. The Los Angeles County Sheriff's Department knew, or should have known that such results could occur in the absence of a definite and understandable policy.

Therefore, the Court finds for the Plaintiff Richard Compton, and against The County of Los Angeles.

The Court further finds for Plaintiff Anita Rexroat and against the Defendant County of Los Angeles, and for Defendant Baca and against Plaintiff Anita Rexroat.

On the subject of damages, it is to be borne in mind that this case deals with a unique chattel, the Magnifico II. Not only was it a luxury vessel, but it was equipped as no other known boat, as a recording studio and with accoutrements of other kinds, making it far more valuable than an equally luxurious craft without such equipment.

The Court finds that the Magnifico II, with its equipmen at the time of its taking on November 10, 1977, was of a value of $3,000,000.00.

The Court further finds that the Magnifico II, insofar as its value to the plaintiff and the conduct of his charter business was effectively destroyed before its return to him. Thus, he has lost all the profits from the use of the Magnifico II and its charters from November 10, 1977, to date.

While it is true that upon recovery, plaintiff sold the boat and its business, the Court believes that he never would have done so, and had no intention of doing so, but for the depravation of his boat caused by the incident of November 10, 1977.

In redressing this loss, the Court adopts the testimony of Stephen Keating as set forth in his Model I, and thus awards damages for lost profits from November 10, 1977, through May 29, 1985, in the amount of $2,483,292.00 and continuing on a daily basis until paid, in the amount of $901.36 per day.

The Court accepts the testimony presented by the plaintiff concerning the value of the personal property aboard his boat and lost by the plaintiff, and awards damages therefor in the amount of $516,063.00.

With respect to plaintiff's claim for rental value of the Magnifico II due to its loss to him as a home, since the plaintiff and his wife also had an apartment at Marina Del Rey sometimes used as a home, and since plaintiff is being awarded damages for the value of the vessel as

well as lost profits, the Court feels that an additional award for rental value as claimed would constitute dual recovery, and thus, the claim for rental value is denied.

The Court believes that plaintiff is entitled to recover the next expenses incurred in his attempt to recover the Magnifico II and awards as damages for such the amount of $42,529.00.

The Court further awards the plaintiff $750,000.00 as general damages as compensation for emotional distress and physical and mental suffering.

Plaintiff Richard Compton have and recover from Defendant The County of Los Angeles interest on the above-mentioned sum at the rate of 10% per annum from the date of entry of Judgment, together with costs and disbursements amounting to the sum of $——.

DATED: Feb. 14, 1986.

/s/ Robert C. Nye
HONORABLE ROBERT C. NYE
Judge of the Superior Court

APPENDIX C

Second Appellate District, Division One, No. B020736
S022340

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

RICHARD MEILICKE,

Appellant

v.

COUNTY OF LOS ANGELES,

Appellant

LEE BACA,

Respondent

[Filed Oct. 3, 1991]

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed June 23, 1991, which appears at 231 Cal.App.3d 1306. (Cal. Const., Art. VI, Section 14, rule 976, Cal Rules of Court.)

/s/ Lucas
Chief Justice

FEB 4 1992
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(2)

No. 91-1157

IN THE
Supreme Court of the United States

October Term, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
aka RICHARD COMPTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURENCE H. TRIBE
Counsel of Record
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February 4, 1992

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether an unpublished California appellate court decision holding the County of Los Angeles liable for property and related damages caused by its clearly unconstitutional 1977 policy of automatically assisting alleged creditors to seize private property (including federally registered vessels) upon the unilateral assertion by such creditors that there has been a "waiver of due process" -- and of effecting such seizures, over the objection of an alleged debtor, without a judicial or administrative hearing of any kind -- should be reviewed by this Court on the basis of questions:

- neither presented to nor resolved by the trial court, the intermediate appellate court, or the California Supreme Court,

- premised on a characterization of County policy that is at odds with what the courts below found that policy to be as a matter of fact, and

- involving a since-replaced federal statute creating special procedures for judicial arrest of federally registered vessels, which generated the issues identified by the County only five times in 68 years.

RULE 29.1 STATEMENT

Respondent Richard Compton, also known as Richard Meilicke, is an individual.

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STATEMENT OF THE CASE

This case involves nothing beyond an intensely fact-bound application of settled legal rules to a unique situation. The questions raised by petitioner County are defective even apart from their lack of legal merit: the principal issues identified by the County rest on a complete distortion of what the Court of Appeal below actually held; the first two questions offered by the County were not raised in the courts below or passed on by them; and the third question would require this Court to decide unsettled issues of California law regarding security interests in the area of preferred ship mortgages. Furthermore, the case is of no precedential significance: none of the opinions below is published, and thus under California practice none may be cited as precedent. The California Supreme Court denied review of this case. There is no reason for this Court to do otherwise.

The courts below found the County liable for illegally assisting the Nicoletti family to seize respondent's ship, the Magnifico II, by force on November 10, 1977. The Nicolettis obtained the aid of County police officers by showing them a document that purported to be a "preferred ship mortgage" giving the Nicolettis a property interest in respondent's ship and supposedly waiving respondent's right to due process. In fact, as the County conceded below, the entire document was "null and void because it was executed under duress, threats of death and bodily harm and acts of extortion."[1] Nevertheless, County officers were directed by *affirmative County policy* to act on the basis of unilateral assertions (made here by the Nicolettis) that the document was a valid ship mortgage, without resorting to any sort of administrative or judicial process. By the time respondent recovered possession of his ship in 1980, both the ship and the business that had depended on it had been utterly ruined. This case is a textbook illustration of why the Constitution directs the government not to seize property without due process of law.

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[1] Clerk's Transcript ("CT") p. 100 (Complaint). *See also* Supplemental Appendix ("SA"), p. 11, lines 7-16 ("SA-11:7-16") (County's stipulation). The attached Supplemental Appendix identifies and quotes all parts of the trial record that are cited, but not quoted in full, in this opposition, for this Court's convenience in confirming the true state of the record in this case.

To transform it into something quite different, the petition heroically rewrites the record in this case from the ground up. As we show in Part I-B, *infra*, the County's description of its policy in its statement of the case -- supported by no citations to the record -- is entirely fictitious. It contains numerous misrepresentations and is completely at odds with the factual findings and the state-law holdings of the Court of Appeal. In brief, County policy was not simply "to keep the peace and to enforce the criminal law," Pet. 5, or simply to recognize that "parties can waive their right to judicial process prior to repossession, *i.e.*, if the mortgagor has obtained a waiver, a 'self-help' repossession may be permitted." Pet. 6. Rather, the "keep the peace" defense for what the County's officers did was merely a charade to deflect attention from what really occurred. *See* note 4, *infra*.

The policy that was applied, and that caused all of respondent's injuries, was the County's policy to recognize self-help repossession by creditors alleging that debtors had waived due process rights, and indiscriminately and actively to assist those creditors to seize private property without any hearing, without inquiring into the truth, and without any effort to comply with special federal rules applicable to the property at issue -- here, a federally registered vessel subject to the federal Ship Mortgage Act of 1920.[2] The County's creativity in rewriting the record

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[2] Because the Magnifico II was registered with the Coast Guard under federal law, any preferred ship mortgage on it would have been governed by the Ship Mortgage Act of 1920, 46 U.S.C. §§ 951-954 (1982), which established a comprehensive remedial scheme for preferred ship mortgages on federally registered ships (requiring creditors to file a federal *in rem* admiralty action) and specified a federal procedure for creditor repossession (requiring that seizure must be accomplished by a U.S. Marshal serving a federal court order to arrest the ship and place the ship under the jurisdiction of the federal court, *see* Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C(3) (Title 28 App.)). The County concedes that the Act's procedure was not followed in this case.

The Ship Mortgage Act, although in effect at all times relevant to this litigation, was repealed and replaced by a new federal statute in 1988. *See* App. 18a n.3; 46 U.S.C.A. § 31321-31330 (West 1990 Pamphlet). *See also* note 16, *infra*.

in this case, and in drafting questions never presented below, are clear indications that no certworthy question could be developed here unless it were manufactured out of thin air. Similarly, the length of this opposition is attributable not to any legal merit in the County's position but rather to its many misstatements of the record and of the decision below.

On October 30, 1978, respondent brought an action in Los Angeles Superior Court pursuant to 42 U.S.C. § 1983, alleging that the County and its officers had "acted without court order, prior notice to plaintiff, or due process hearing in taking possession of [the Magnifico II] and turning said vessel over to [the Nicolettis] thereby depriving plaintiffs of their constitutional right to due process under the California State Constitution and the Constitution of the United States of America." CT 22:3-9. After a trial spanning six weeks and consuming more than 3,000 transcript pages, the Superior Court ruled against the County on the issue of liability, and in a final judgment rendered February 14, 1986, awarded respondent damages for injuries proximately caused by the County's violation of his rights.[3]

On June 28, 1991, the Court of Appeal (Second Appellate District, Division One) unanimously affirmed in all respects.

The County then petitioned for review in the California Supreme Court, attempting to create the appearance of an important legal issue by -- in its own words -- "[s]plicing

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[3] On the issue of liability, the trial court also found against respondent and in favor of the police officer in charge on the scene, Lt. Lee Baca, essentially on the ground that the officer had merely been doing his job as the County had led him to understand it. The Court of Appeal affirmed. App. 35a-38a. Respondent's California Tort Claims Act suit against both the County and Lt. Baca was dismissed on grounds of immunity. The Court of Appeal affirmed on the basis that all actions taken by Lt. Baca leading to respondent's loss of his property were "discretionary" decisions made in pursuit of the County's policy, and therefore entitled to protection under state law. App. 38a-42a. The Court of Appeal's holdings with respect to Lt. Baca reflect and reinforce its definitive factual finding that this case involves the application of County policy, rather than the unauthorized acts of County officials. *See* pp. 7-9, *infra*.

together" enough isolated but supposedly "relevant portions of the Court of Appeal's opinion" to suggest that the lower court's express "unconstitutional policy" factual findings and legal holding were simply legal "legerdemain" because they could not be squared with what was supposedly the "only rational interpretation" of the lower court's opinion taken as a whole. Petition for Review, at 14, 17. Even though the County was joined by a host of other California municipalities who echoed the County's version of what its policy had been and what the Court of Appeal had held, the California Supreme Court, evidently seeing through this strategy, on October 3, 1991, denied the County's petition for review. Treating this case as a purely fact-bound application of settled law with no general significance for the legal world at large, the California Supreme Court also ordered that the Court of Appeal's decision not be published or cited as precedent.

REASONS FOR DENYING THE WRIT

I. THE COUNTY'S FIRST QUESTION IS NOT PROPERLY PRESENTED AND HAS NO MERIT

A. THE COUNTY HAS FAILED TO SHOW THAT THE FIRST QUESTION WAS RAISED BELOW

Pursuant to 28 U.S.C. § 1257(a), this Court will not consider claims that were not raised before or passed on by the state court whose judgment it is asked to review. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *id.* at 85 (White, J., concurring); *id.* at 89 (Scalia, J., concurring in part and in the judgment). Implementing this principle, Rule 14.1(h) of this Court requires a petition for certiorari to specify in the statement of the case:

> [T]he stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific

> reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

As to each of the "questions presented," the instant petition plainly fails to comply with this Rule, and for that reason alone should be denied. *See* Rule 14.5.

In fact, the County's first question presented was never argued in the state courts. The County's distinguished appellate counsel, newly added for purposes of this proceeding, have crafted a question of Section 1983 law on which the County was mute below. Indeed, the County's position in this case has always been that its policy was simply one of "keeping the peace," that "a public entity may not be held liable for ordinary negligence in connection with failure to train its employees," and that "the record will not support a finding of deliberate disregard." Opening Brief for Appellant County of Los Angeles in the Court of Appeal, at 21, 25 (quoting argument headings). The County acknowledged that "[l]iability may be imposed . . . where the government entity causes a constitutional violation through the execution of a governmental policy or custom," *id.* at 20, and indeed contended that "[t]he *only* way the County could be liable for Baca's actions was if Baca had inflicted a constitutional injury while executing County policy." *Id.* at 23 (emphasis in original). The County denied that Baca had done so; the Court of Appeal disagreed. None of the County's arguments below implicated (nor has any court in this case passed on) the question the County now presents, namely: "Whether a local government may be liable under 42 U.S.C. § 1983 for a policy that is lawful in the ordinary course simply because the policy causes a violation of a federal statute in an exceptional circumstance not foreseen when the policy was adopted or enforced."

B. THE FIRST QUESTION RESTS ON A MISCHARACTERIZATION OF WHAT THE COURT BELOW ACTUALLY HELD

The County attempts to manufacture a question that it hopes is certworthy by maintaining that the decision of the California Court of Appeal is in tension with *City of Canton v. Harris*, 489 U.S. 378 (1989), and "imposes strict liability" based on a supposed "failure to train police officers on myriad technical and shifting points of law." Pet. 9. The County's argument and question presented are premised on a complete distortion of what the Court of Appeal actually held. The Court of Appeal clearly understood the import of *City of Canton*, as evidenced by its accurate exegesis of that decision. *See* App. 15a-16a. But *City of Canton* is not dispositive here. This is not a failure-to-train case, but rather one involving a municipal policy that was itself illegal under federal law. Looking beyond the County's verbal smokescreen, if there are any disputed issues in this case, they are: "As an historical matter, what was the relevant policy toward self-help repossession of the County of Los Angeles in 1977?," and "Did this particular respondent prevail below on an 'unlawful policy' theory, or on a 'failure-to-train' theory?" It is difficult to imagine more fact-intensive and less certworthy questions than these.

1. This Is Not a "Failure-to-Train" Case

The Court of Appeal rejected the County's assertions -- now recycled in its petition for certiorari -- that the relevant policy applied at the time of the events in question was simply to "keep the peace," Pet. 11, and to permit a "party [to] waive his or her right to judicial process prior to repossession." *Id.* at 12. Instead, the Court of Appeal stressed that "this case cannot be treated simply as a failure to train case but must be viewed as a case involving an *unlawful policy*." App. 25a (emphasis added). The County's policy, according to the court below, "went beyond mere peacekeeping." App. 23a. There was ample evidence in the record that no threat of violence ever existed and therefore that the County's "keep the peace" defense was a charade based

on perjury by County officers.[4] As the Court of Appeal found, the County's policy was to side with, and to facilitate repossession by, any purported creditor who alleged that a debtor had waived "due process," without affording judicial or administrative process to test such allegations, and without making any effort to comply with special federal rules applicable to the property at issue. The Court of Appeal explained that:

> The policy included assisting in self-help repossessions where it was determined one party to the mortgage had waived 'due process' and the right to object to the repossession. . . . [H]ere the waiver was given effect and [the County's] employees assisted in the self-help repossession by forcing plaintiff to

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[4] For example, Deputy Cowen, who was on the scene when the danger of violence supposedly commenced, indicated that although there was a civil dispute over the ownership of the Magnifico II, no one was near the ship threatening Compton, there was no immediate danger of confrontation, and at the time Cowen turned over control to Baca *all* concerns about violence had passed. SA-1:34 to SA-2:16. Evidence from Lt. Baca indicates that no threat of violence arose thereafter. In a sworn affidavit made shortly after the events in question, and filed on behalf of Nicolino Nicoletti against respondent's state-court action for emergency relief, Baca stated that "Compton agreed to leave the vessel peaceably and orderly" and that "[w]hile in my presence I observed no breach of the peace *and no threats of violence by either party involved.*" SA-2:24-29 (emphasis added) (quoting Exhibit 18).

To be sure, some officers claimed that a serious threat of deadly violence did exist, but this testimony was contradicted by other witnesses and depended entirely on the officers' credibility. In fact, the trial judge expressly stated that he simply did not believe such claims. In his decision from the bench concerning liability, the trial judge explained: "There are a lot of things that I think I want to say, and yet, I am not sure I ought to say" concerning the fact that "a lot of [witnesses] have taken a lot of liberties with the truth in this case. I think I will comment on only one." SA-1:7-10. The trial judge then condemned one officer as an "outright liar" for his testimony that in the midst of a supposed "near-riot going on, [with] people threatening to kill each other," the officer saw "one of the participants in that melee pass a gun to another" -- but that the officer never said "anything about it to anybody" until seven years later at trial, and "never [did] anything about it at all." The trial judge declared: "I simply do not believe that ever happened," and he concluded: "Now, that may give you some indication of the way the court received most of the defendants' case." SA-1:11-31.

> bring the Magnifico back to the dock, by forcing him and his security guard off the boat, and by allowing the Nicolettis to place their guard on the boat and refusing to allow plaintiff or his wife to return to the boat. Since [the County's] policy and actions went beyond mere peacekeeping, it cannot escape liability.

App. 23a.[5]

Indeed, the County itself argued in the trial court that its deputies had done precisely what the County's policies in November 1977 dictated. In an exchange with the trial judge, County counsel specifically stated that no amount of training could have avoided the violations of federal rights at issue here, because County officers had acted exactly as required under County policy. **SA-5**:1-31. This was of course the ground on which Lt. Baca was granted immunity for his actions. *See* note 3, *supra*. The County insisted, and the record revealed, that under County policy, its officers would be expected to side with and assist creditors in effectuating self-help repossession whenever those creditors recited "the magic words," **SA-3**:39, accusing their debtors of trespass and invoking citizen's arrest authority. *See* **SA-3** to **SA-4**; *see also* **SA-6** to **SA-10** (excerpting detailed testimony on this policy and on how it was applied in this case).

Faced with this damning record, the trial court concluded that the seizure of respondent's property represented not a deviation from the County's 1977 policy but, "semantic[s]" aside, instead a "deprivation of constitutional rights . . . *bound to happen*" under that policy. **SA-5**:35-38 (emphasis added). In fact, the County's initial brief below maintained that "it would [not] have

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[5] Tellingly, the County's petition for certiorari fails to quote any relevant portion of the Court of Appeal's opinion. Instead, the County simply asserts that the trial court held, as a basis for liability, that "the Sheriff's Department had failed to train its officers or to adopt a policy with respect to enforcement of preferred ship mortgages." Pet. 7. But what is sought in this case is review of the Court of Appeal's judgment, not that of the trial court. And the County's description of the trial court's decision is extremely misleading; as the Court of Appeal explained, the trial court did *not* in fact rest its decision on a failure-to-train theory. App. 24a.

made any difference if Los Angeles had trained its deputies concerning preferred ship's mortgages" because under County policy its officers "still would have been required" to commit the acts that the Court of Appeal found were the basis of the County's liability. Opening Brief of Appellant County of Los Angeles in the Court of Appeal, at 29. For the County now to insist that the cause of respondent's injury in this case was "the *absence* of policy or training," Pet. 13 (emphasis in original) is directly contrary not only to the intensely factual holding of the Court of Appeal but also to the County's own arguments in both the trial court and the Court of Appeal.

2. The Decision Below Is Not Based on a "Nonfeasance" Theory

The County was not held liable for "nonfeasance" -- i.e., "for failing to adopt a policy on foreclosure of preferred ship mortgages," Pet. 14 -- but rather on the basis of the County's *affirmative policy* of aiding all self-help repossessions. The Court of Appeal did not find that the County had drafted an otherwise lawful policy that simply was silent on the subject of the repossession of property with special designations and protections under federal law. On the contrary, the Court of Appeal specifically *rejected* the County's claim that it was guilty of merely "a failure to adopt a policy concerning preferred ship mortgages." App. 16a-17a. Instead, the court explained that the County's policy was to assist self-help repossessions "regardless of the type of property in dispute," App. 28a, and thus to draw no distinctions based on the nature of the property seized in the repossession:

> It is admitted the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. *Its policy was to treat all civil repossessions alike*: The Sheriff's Department was to function in an impartial manner, not taking sides or determining who was right and wrong, but merely ensuring no breach of the peace took place. Generally, repossessions could not be effected if the owner was in personal possession of the property and objected to repossession. However, Lieutenant Baca testified, policy allowed that if the parties agreed to *waive* their due process rights, reposses-

sion could be effected *even over the owner's objection.*

App. 18a (emphasis added).

It was clear to the Court of Appeal that the County "did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here," and that Lt. Baca had acted on the basis that "plaintiff had waived his due process rights and Nicolino Nicoletti therefore was entitled to immediate possession of the Magnifico, even over plaintiff's objection." The Court of Appeal concluded: "There being a policy, the question is whether there is substantial evidence to support the conclusion this policy violated plaintiff's federal statutory rights." App. 18a; *see also* App. 23a, 25a.

In sum, the Court of Appeal did not hold the County liable for failing to adopt a special policy to implement the Ship Mortgage Act (or, indeed, any other federal law). Rather, the court held the County liable for a straightforward application of its deliberate policy of applying a uniform approach that refused to draw distinctions based on the kind of property being repossessed. The court simply held that, if a California city or county (a) *chooses* to adopt an affirmative policy of aiding self-help repossession efforts by official means, and (b) *chooses* to apply that policy indiscriminately to all types of property, without regard to distinctions drawn by federal law, and (c) *chooses* to have its officers act on the basis of untested representations by one of the parties that the other has waived her right to due process, and (d) *chooses* to bypass any sort of judicial or administrative procedure, then the city or county will be liable for the adjudicated violations of federal law that executing this policy causes.

C. IN ANY EVENT, THE COUNTY'S FIRST QUESTION DOES NOT WARRANT REVIEW

Even if the County's first "question presented" had been preserved, and had a basis in the decision below, the question would present no issue worthy of this Court's review.

1. The County Simply Ignores the Fact That Its 1977 Policy Violated Due Process

The County's focus on the Ship Mortgage Act and its insistence that its policy is "generally correct and lawful" in the "ordinary course," Pet. i, 13, betray a fundamental misconception about this case. The critical defect in the County's 1977 policy was that it violated due process, not some sort of minor technicality triggered by a since-repealed federal statute. Thus, although the Ship Mortgage Act did play an important supplementary role in this case -- by prescribing the specific procedures by which a party must use a federal instrument to seize a federally registered ship[6] -- the Act was not the sole or even the primary reason that the County's policy was illegal. The Act simply regularized and gave specific content to the "process due" in this particular area of the law.

The County can make its claim that its policy was "generally" valid only by ignoring what the courts below determined its policy to be in 1977, *see* p. 6-10, *supra*, and euphemistically referring to its policy as one of "recognizing waivers" to judicial process. Pet. 13. But County policy did much more than that: it required County officers forcibly to assist a self-help repossessor to gain the private property of another person -- without resort to *any* judicial or administrative procedures -- solely on the basis of the repossessor's unilateral assertion that he or she was entitled to the property, above the property holder's vehement objections, *see* note 10, *infra*.[7] The core constitutional flaw in

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[6] *See, e.g.*, App. 23a (County "policy included assisting in self-help repossession where it was determined one party to the mortgage had waived 'due process' and the right to object to the repossession. In the case of a preferred ship mortgage, such a waiver is not valid and there is no right to self-help repossession.").

[7] The County makes much of the fact that the mortgage presented by the Nicolettis to the police purported to authorize self-help repossession, and to waive respondent's right to judicial and administrative procedures. *See* Pet. 4. But the County stipulated long ago that the entire mortgage, together with the purported waiver, was completely invalid because it was extracted from respondent and his family at gunpoint. *See* p. 1 & n.1,

the County's policy has nothing to do with federally registered ships. Indeed, the County's policy would obviously violate due process as applied to any vessel, vehicle, or other item of real or personal property.

The County's policy flies in the face of such elementary due process cases as *Fuentes v. Shevin*, 407 U.S. 67 (1972), where this Court found violative of due process state replevin provisions that permitted vendors to seize goods by making an *ex parte* application to a court clerk, unilaterally pointing to a written purchase agreement containing a purported waiver of due process, and posting a bond. Indeed, the County's policy was more clearly and flagrantly unconstitutional than this, and exceeds anything contemplated by even the dissent in *Fuentes*. *See* 407 U.S. at 99-102 (White, J., dissenting). The County's policy demanded no bond or detailed affidavit, afforded no opportunity for a prompt post-deprivation hearing,[8] and required

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supra. The County's position that it may give effect to any waiver whose invalidity is not apparent on the document's face, Pet. 4, proves respondent's point. The invalidity of forged, extorted, or similar waivers will almost never be apparent from the face of the document alone, and the County's blanket policy of giving effect to all such waivers guarantees a significant number of due process violations. Thus, in *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972), this Court found a due process violation despite the existence of a written document, valid on its face, that purported to authorize self-help repossession.

[8] In this case, respondent unsuccessfully sought a preliminary injunction in state court against the Nicolettis to reclaim his vessel. But this was not an adequate post-deprivation remedy, because under California law such relief is available only in extraordinary circumstances. Furthermore, the preliminary injunction proceeding did not adjudicate the legality of the ship *seizure* under federal law, because, after the County deputies had helped the Nicoletti family gain possession of respondent's ship, Nicolino Nicoletti executed a private sham sale transferring legal title in the vessel to himself. It was the legitimacy of that transaction, and specifically the enforceability of a security agreement that purported to authorize the sale and transfer of ownership, that was at issue in the preliminary injunction proceeding. *See generally* Clerk's Transcript, pp. 1-14.

Hence, petitioner's claim that the County was not the "moving force" behind respondent's loss of his yacht because the state court "deni[ed] his

application not to a neutral magistrate or court clerk but simply to a police officer.[9] The petition's citation of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), Pet. 14, proves respondent's point. There this Court warned that even "in the civil area, '[w]e do not presume acquiescence in the loss of fundamental rights,'" *id.* at 186 (citation omitted), and found that a party had waived its right to pre-deprivation judicial process only because the waiver had been "voluntarily, intelligently, and knowingly made." *Id.* at 187; *see also Fuentes*, 407 U.S. at 94-95. In this case, the waiver was the product of extortion, and the very design of the County's policy meant that the underlying extortion would not be examined, and that the resulting involuntary "waiver" would be enforced.[10] The County's policy

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motions for a preliminary injunction," Pet. 12 n.12, is entirely without basis. The state trial court in that separate action against the Nicolettis did not reach the question of the legality of the seizure. In addition, as the Court of Appeal noted, "the exercise of the court's independent judgment in the Nicoletti action did not cause plaintiff's injury but merely failed to prevent exacerbation of an injury which already had occurred." App. 26a.

Finally, petitioner speculates that even if County policy had been lawful, respondent nonetheless might have lost his vessel. Pet. 12 n.12. The Court of Appeal carefully analyzed this claim and properly rejected it. App. 25a.

[9] *See also Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (striking down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (invalidating an ex parte garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt post-deprivation hearing).

[10] *See* page 1 & n.1, *supra*. Indeed, in this case respondent promptly and vocally objected to repossession and explained that the preferred ship mortgage was obtained through extortion -- both to Lt. Baca individually, *see* **SA-14**:11 to **SA-16**:16; **SA-18**:19-33, and to County officers generally. *See* **SA-11**:19 to **SA-14**:9; **SA-17**:26 to **SA-18**:15. Respondent's wife also strongly objected to repossession on the same grounds, but was dragged from the ship by County officers. *See* **SA-16**:19 to **SA-17**:23. County policy simply did not assign any significance to these objections, and they were accordingly ignored. County officers were commanded by County policy forcibly to assist the Nicolettis' efforts at self-help repossession.

plainly "presents too great a risk of erroneous deprivation" to withstand due process scrutiny. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2114 (1991); *cf. Zinermon v. Burch*, 110 S. Ct. 975, 986-90 (1990).

To be sure, the Court of Appeal did not go so far as to hold explicitly that the County's policy of indiscriminately assisting creditors with self-help repossession violated due process even as applied to property *other* than a federally registered ship, although it is hard to avoid the conclusion that it would have. In a model of judicial restraint, the court below evidently preferred to rely on a narrow statutory ground made available by the special facts of the case before it rather than reaching for a broader constitutional ground that would have swept in a wide range of factual settings:

> Plaintiff had the federal statutory right not to have the boat taken from him unless the procedures set forth in the Ship Mortgage Act were complied with, which did not occur. Therefore, defendant's policy, which enabled Nicoletti to obtain immediate possession of the Magnifico over plaintiff's objection without having him go through "due process," violated plaintiff's federal statutory rights. This being the case, defendant may be held liable for the violation under section 1983.

App. 28a. But the court left no doubt about the underlying nature of the dispute and noted on at least seven occasions in its opinion that the crux of respondent's complaint has always been that he suffered "deprivation of his property *without due process of law*." App. 11a (emphasis added). *See also id.* at 10a-11a (referring to "due process"); *id.* at 13a (noting County's claim that it "did not violate plaintiff's constitutional rights"); *id.* at 15a (discussing liability for violation of "federal constitutional rights"); *id.* at 18a (referring to "due process rights"); *id.* at 23a (twice referring to "due process"). Respondent, who consistently raised the due process argument in the proceedings below, is of course free to defend the Court of Appeal's judgment on that basis in this Court.

The County's first question presented is thus fatally flawed

because it ignores the unconstitutionality of the County's policy under the Due Process Clause of the Fourteenth Amendment. This precludes any conceivable suggestion that County policy is somehow "lawful in the ordinary course."

2. The First Question is Foreclosed by Precedent

The County maintains that, because its policy was "generally correct and lawful," Pet. 13, it should be held liable only if it was "deliberately indifferent" to the need for an "exception" to cope with the "extraordinary" and arcane requirements of the Ship Mortgage Act. Pet. 14, 16. The County's position is deeply flawed.

First, the salient norm here is due process, not the Ship Mortgage Act, and even under the County's proposed approach it can hardly be said that due process is a "technical, counter-intuitive exceptio[n]," Pet. 15, regarding which the County is entitled to plead ignorance.

Second, the County's contention is foreclosed by *Owen v. City of Independence*, 445 U.S. 622 (1980), which expressly held that municipalities enjoy no good-faith immunity whatsoever under Section 1983 and thus cannot defend against Section 1983 liability for damages caused by policies that violate federal law by proving that they did not deliberately intend to transgress federal requirements. It is no defense to say that the Ship Mortgage Act is arcane or that the County could not reasonably have been expected to know of it. "[W]hen a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision . . . . Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Owen*, 445 U.S. at 649. The *Owen* rule has been repeatedly and recently reaffirmed, *see, e.g.*, *Howlett v. Rose*, 110 S. Ct. 2430, 2443 (1990); *Will v. Michigan Department of State Police*, 491 U.S. 58, 67 (1989); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 12 n.3 (1989); *Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Brandon v. Holt*, 469 U.S. 464, 472-473 (1985), and the County, which barely mentions *Owen* in its

petition, Pet. 14, does not ask that it be re-examined. Nor does this case -- with its record of an egregiously unlawful policy in violation of due process, of the Ship Mortgage Act, *see* note 11 and pp. 22, 25-29, *infra*, and perhaps also of state law, *see* pp. 24-25, *infra* -- present an apt opportunity to reconsider *Owen*.

The County complains that a municipality cannot be expected "to anticipate" legal requirements for its policy "that have not even been established at the time the policy is made." Pet. 16. Of course, the requirements of both the Due Process Clause of the Fourteenth Amendment and the Ship Mortgage Act of 1920 were well known at the time the County promulgated and executed its policy.[11] But, at any rate, the County's legal position was rejected by this Court in *Owen* itself (*see* 445 U.S. at 658 (Powell, J., dissenting)), and in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *See* 475 U.S. at 485 (White, J., concurring); *id.* at 491 (O'Connor, J., concurring in part and in the judgment).

Third, the County's attempt to engraft the "deliberate indifference" standard of *failure-to-train* law onto a case involving an *unlawful policy* is wholly unwarranted and confuses apples and

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[11] Even in 1977, one could hardly have avoided recognizing the conflict between the County's policy and the Ship Mortgage Act of 1920 -- as revealed by the testimony at trial of respondent's admiralty attorney, who quickly reached that conclusion on the day of the events in question. As the Court of Appeal noted, "Attorney Russell told [respondent that] federal law protected the boat from seizure under a preferred ship mortgage except by a federal marshal acting under court process, such as an arrest warrant, and he advised plaintiff to take the boat out to sea to avoid any attempted repossession." App. 5a. To Russell, in 1977, it was obvious what federal law required, and he explained it quickly to respondent. *See* **SA-19** to **SA-20**. Further, Russell then briefed Lt. Baca, the County official in charge, on the procedure, as Baca admitted. *See* **SA-21**. Russell's advice was well grounded in then-existing precedent. *See* pp. 26-27 & n.22, *infra*. The case on which the County relies (Pet. 13-14), *Challenger, Inc. v. Durno*, 227 F.2d 918 (5th Cir. 1956), is distinguishable for the reasons noted by the Court of Appeal below: it did not "discuss or analyze the question whether the Ship Mortgage Act allowed state-law self-help procedures to repossess a vessel subject to a preferred ship mortgage." App. 20a.

oranges.[12] Respondent's identification of official County policy -- which by definition the County adopted consciously rather than accidentally or negligently -- is sufficient to demonstrate a deliberate act undertaken by the County. There is no danger here, as there is in the failure-to-train area, of disguised *respondeat superior* liability, nor is there the possible linguistic difficulty posed by "the submission that someone pursues a 'policy' of 'inadequate training.'" *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion).

Where an unlawful municipal policy is shown, there is no need for an additional showing, before liability is imposed, that the policy is "generally" invalid or that the municipality was "deliberately indifferent" to a possible "extraordinary application" of that policy. Pet. 16. Rather, "once a municipal policy is established, 'it requires only one application . . . to satisfy fully *Monell*'s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.'" *Pembaur v. Cincinnati*, 475 U.S. 469, 478 n.6 (1986) (quoting *Tuttle*, 471 U.S. at 822 (plurality opinion)). Respondent showed, and the Court of Appeal found, "an affirmative link between the [unlawful] policy and the particular constitutional violation alleged." *Tuttle*, 471 U.S. at 823 (plurality opinion); *see, e.g.*, App. 23a, 25a.[13]

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[12] In this regard, the County's citation of a series of lower court cases decided and argued exclusively on failure-to-train theories is irrelevant. *See Buffington v. Baltimore County*, 913 F.2d 113, 123 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1106 (1991); *Santiago v. Fenton*, 891 F.2d 373, 381 (1st Cir. 1989); *Dorman v. District of Columbia*, 888 F.2d 159, 163 (D.C. Cir. 1989). The County's description of *Merritt v. County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989), is particularly misleading. *Merritt* was pleaded, argued, and decided as a straightforward failure-to-train case; the court did not decide that "the County's general policy was lawful" or that the need for an "unusual exception" should be judged according to a deliberate indifference test. Pet. 15. Rather, the court simply noted that there was not sufficient evidence that any deficiency in the police officers' training was the product of deliberate indifference.

[13] The County errs when it asserts that this is a case where some sort of broad, general policy like "maintaining a police force," Pet. 13 n.13, has

Fourth, the County's suggestion that it may not be sued for adopting a "generally" valid policy has no application here. It is disingenuous to characterize as valid "in the ordinary case" an *affirmative* municipal *policy* of indiscriminately assisting self-help repossession whenever a creditor claims that a debtor has waived "due process," whether or not the property involved possesses a special status under federal law. As a practical matter, the County's policy may well be challenged in court only when the creditor's claim *is* fraudulent and only when the seized property *does* have a special status under federal law. But that does not mean that the policy is "generally" valid, and the County's insistence otherwise amounts to an assertion that a tree falling in the forest makes no noise if there is no one nearby to hear it. The County's policy contains critical defects that, while perhaps not triggered by the factual circumstances of every case, unavoidably cause it to violate federal constitutional and statutory rights in those instances where they come into play.[14]

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been cited in an attempt to infer that every detail of the police force's conduct (such as the use of deadly force, as in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)) can be traced to official municipal policy. In this case, there was a factual finding by the Court of Appeal that the County of Los Angeles had specifically instructed its officials to assist self-help repossession efforts by creditors who asserted that debtors had waived due process rights, without any resort to judicial or administrative process, over the objection of the alleged debtor, and regardless of the status of the property at issue under federal law. The *Tuttle* Court distinguished precisely this kind of case. *See* 471 U.S. at 820.

The County did not preserve below, and does not advance here, any claim that the trial evidence was factually insufficient to support the Court of Appeal's findings as to what the County's policy was. There is, of course, no rule that only a formally memorialized paper trail, or other "smoking gun" evidence of deliberations from on high, can suffice to establish an illegal municipal policy. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970).

[14] The County's policy here is in this respect comparable to New York City's policy in *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 661 n.2 (1978), of placing pregnant employees on maternity leave

Fifth, the County's proposal would plunge both municipalities and the federal courts into a sea of confusion by making municipal liability turn on subjective and unprincipled judicial "eyeballing." The County offers no test for determining when a policy is "generally" lawful and when it is not; what kinds of "excep-

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after their fifth month except where continued work was permitted by a physician and the head of the employee's agency. That policy was not "generally valid," as the County itself admits, Pet. 14, even though it did not give rise to damage actions for backpay in cases where, for example, the woman did obtain the requisite permission to continue working, or was forced for health reasons to take leave anyway after the fifth month. Similarly, the municipal policy in *Owen* of terminating at-will employees without a hearing did not "necessarily entail[] a violation of federal rights in every situation in which it applied." Pet. 14. Rather, the policy was unlawful because it denied a hearing even when "an allegedly false statement impugning [the employee's] honesty and integrity" had been released. *Owen*, 445 U.S. at 633-634 n.13.

In the County's parlance, the City of Independence had merely "fail[ed] to carve out an 'exception' to [its] policy," Pet. 14, of not providing hearings to address the "extraordinary application" of that policy, Pet. 16, in circumstances where allegedly defamatory statements were released about the employee. Nevertheless, this Court did not find the City immune from liability. In the same vein, this Court did not ask whether the policy at issue in *Pembaur* -- warrantless forcible entry under certain situations -- was "generally" invalid or whether the possibility of exigent circumstances (such as hot pursuit) or consent made such a generalization impossible.

In cases such as *Monell* and *Owen* involving unlawful municipal policies, this Court has never bothered to inquire where the policy at issue was valid "generally" or in the "ordinary course," or even whether there were situations in which the policy could lawfully be applied. Such an approach, if ever appropriate, would be limited to failure-to-train cases, where the gravamen of the claim is that "a *concededly valid* policy [has been] unconstitutionally applied by a municipal employee." *City of Canton*, 489 U.S. at 387 (emphasis added). Even in the failure-to-train context, this Court has already rejected the proposed rule -- proffered with great skill by the same esteemed counsel who now represent the County in this case -- that only policies unconstitutional in all their applications may give rise to Section 1983 liability. *See City of Canton v. Harris*, 489 U.S. 378, 386-387 (1989); *id.* at 396 (O'Connor, J., concurring in part and dissenting in part). Where a municipality has officially adopted a policy that is invalid -- either facially or in terms of particular applications of the policy -- the County's proposed approach is irrelevant.

tions" are "major one[s]," Pet. 15, that a municipality apparently may be required to address; and how frequently municipal agents must encounter a problem before a municipality may be expected to adopt a policy exception to deal with it. Pet. 16. The contrary approach of both this Court and of the California Court of Appeal -- that a municipality may be held liable for violations of federal rights caused by its official policies -- is much more principled, and is settled law.[15]

II. THE COUNTY'S SECOND QUESTION LIKEWISE IS NOT PROPERLY PRESENTED AND HAS NO MERIT

The County did not raise at trial, on appeal, or before the California Supreme Court the second question, regarding the rights of mortgagors under the Ship Mortgage Act of 1920, that it now presents in its petition for certiorari. Not surprisingly, the County also fails to comply with Rule 14.1(h) with respect to this

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[15] Finally, even if the County's question had been properly raised below, even if it were not foreclosed by the Court of Appeal's decision regarding the nature of the County's policy, and even if it presented an important legal question, review would still be inappropriate in this case because the Court of Appeal, in the course of rejecting a different legal argument raised by the County, noted in the alternative that the "deliberate indifference" standard was met here. The court explained that the County's "lack of policy . . . may 'amount[] to deliberate indifference to the rights of persons with whom the [sheriff's deputies] come into contact.'" App. 17a-18a (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

The County complains that there was not "sufficient evidence to support a finding of deliberate indifference." Pet. 13. But, whatever the merits of that purely fact-bound argument, the County has procedurally defaulted on it by failing to request a statement of decision in timely fashion from the trial court. The Court of Appeal explained that, under long-settled California law, "[w]here there is no statement of decision, the appellate court must assume the trial court found every fact necessary to support the judgment." App. 15a. Thus, even if this Court were inclined to review the factual record for itself to determine the sufficiency of the evidence regarding deliberate indifference, the County's procedural default would preclude such review, for it means that the Court of Appeal's judgment rests on an adequate and independent state-law ground. *See, e.g., Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

question, making it proper to decline review under Rule 14.5. Review here would be entirely inappropriate, and there is no reason to hold the petition pending the decision in *Suter v. Artist M.*, No. 90-1488, which will, at any rate, involve a very different statutory scheme with little relevance to this case.

Review is also unjustified because the County policy plainly violated respondent's rights under the Due Process Clause of the Fourteenth Amendment, and there is thus no need to decide *any* question regarding the availability of self-help measures under the Ship Mortgage Act -- a topic which, according to the County, arose precisely *five* times (besides this case) in the 68 years between the Act's passage in 1920 and its repeal in 1988. Pet. 20 & n.18. After repeal, the Act was replaced with a quite different statute; a decision by this Court concerning the old Act would therefore have no binding future effect. *See* note 2, *supra*, and note 16, *infra*. Moreover, no court (state or federal) has ever considered the second question presented by the County: whether the Ship Mortgage Act of 1920 conferred on mortgagors a right enforceable under § 1983. This Court would have to examine the matter without any guidance from any other tribunal.

Even if this Court wanted to decide whether the Ship Mortgage Act of 1920 or its replacement conferred enforceable rights on mortgagors, this case would be a poor vehicle indeed for accomplishing that end. Although the Nicolettis showed the County's officers a document *purporting* to be a "preferred ship mortgage," it was not really such a mortgage at all (as the County concedes, *see* p. 1 & n.1, *supra*), but rather an extorted document which the Nicoletti family had obtained at gunpoint. It would be little short of fantastic to "decide" the rights of mortgagors under a since-repealed statute in a case in which there is no true mortgagor. A phantom voyage in so leaky a boat would reach no destination worthy of this Court's concern.

But even if the very oddity of the proposed trip were to hold some special charm, this Court could hardly accept the County's invitation, for the County offers no persuasive argument on the merits of its question presented. At a general level, the Ship Mortgage Act was intended to benefit both mortgagors and

mortgagees by regularizing the creation and foreclosure of preferred ship mortgages. To be sure, Congress "hope[d] that the financial investors, or the banking interests of the country, will be willing to invest their money more freely in ship securities." *Recording of Mortgages on Vessels and Subordinating Maritime Liens Upon Vessels for Necessaries to the Liens of Mortgages: Hearing on H.R. 8422 Before the House Comm. on the Merchant Marine and Fisheries*, Pt. 1, 66th Cong., 1st Sess. 4 (1919). But the Act was not an effort to protect investors; it was primarily a move to benefit mortgagors, to stimulate the expansion of the U.S. merchant marine fleet after World War I.

At a specific level, both the text and structure of the Act indicate that mortgagors were its intended beneficiaries. The Act specifically referred to mortgagors. 46 U.S.C. §§ 922(c)(1), 951 (1982 ed.). *See Wilder v. Virginia Hospital Assn.*, 110 S. Ct. 2510, 2517-18 (1990). And, like the NLRA provision at issue in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111-12 (1989), the rights of mortgagors were apparent in the "structure" of the Act. The Ship Mortgage Act functioned in a manner akin to the Bankruptcy Act: it required that a creditor seeking to foreclose a preferred ship's mortgage do so in an *in rem* suit in admiralty, over which federal district courts were given exclusive jurisdiction. 46 U.S.C. § 951. The creditor bringing suit was required to give notice to "the master of the vessel" and "any person who has recorded a notice of claim of an undischarged lien upon the vessel," § 951, in order to avoid a destructive race among creditors that would create a "collective action" problem and make all worse off. *Cf.* T. Jackson, *The Logic and Limits of Bankruptcy Law* 11-19 (1986). The Act prohibited creditors from acting "to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel." § 922(a)(3). This structure evidenced a congressional intent to create an enforceable right in mortgagors -- for, by asserting a violation of the Act's ban on self-help remedies, a mortgagor prevented a creditor from circumventing the claims of other holders of preferred ship mortgages.

III. THE COUNTY'S THIRD QUESTION SIMILARLY IS NOT PROPERLY PRESENTED AND HAS NO MERIT

The County's third question, relating to the preemptive effect of the Ship Mortgage Act of 1920, is also completely inappropriate for review for reasons already discussed: (1) the County's policy is inconsistent with due process, and so its conflict with the Ship Mortgage Act is unnecessary to the judgment below; (2) the Ship Mortgage Act has been repealed and replaced with a new and different law;[16] (3) the preemption of self-help reme-

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[16] *See* note 2, *supra*. The County takes a bird's eye view of the two statutes and announces from this perspective -- with no supporting analysis -- that the relevant provision "remains substantially unchanged." Pet. 22 n.20. This assertion is wholly unwarranted. Even a cursory glance reveals that the 1988 replacement statute, which appears at 46 U.S.C.A. § 31321-31330 (West 1990 Pamphlet), was intended, in the words of one of its Senate sponsors, to "revolutionize our vessel financing system." 134 Cong. Rec. S17080 (Oct. 20, 1988) (statement of Sen. Breaux). The new law makes substantial revisions in the definition of preferred mortgages, 46 U.S.C.A. § 31322, and in filing and recording requirements and discharge conditions, § 31321, and it adds civil and criminal penalties for noncompliance. § 31330. None of these features of current law could be examined if the County's petition were granted, and their relevance for preemption analysis would remain unexplored. A decision by this Court in this case would therefore control no future case, and the County cites no case currently pending that involves an application of the old law. In particular, there are at least three aspects of the 1988 law that directly implicate the preemption question:

(1) Unlike the old Act's foreclosure provision (46 U.S.C. § 451), the corresponding section in the new law (46 U.S.C.A. § 31325(b)) lists three ways in which, "[o]n default of any term of the preferred mortgage, the mortgagee may enforce the preferred mortgage lien." Self-help repossession is not one of the specified methods of enforcement. The omission of self-help repossession might be taken to imply that it is not an available option. *See, e.g.*, *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988).

(2) The 1988 statute added a new means of enforcing a mortgage: a non-admiralty civil action against the mortgagor. 46 U.S.C.A. § 31325-(b)(3). Prior to 1988, the mortgage could be enforced only if the vessel were in U.S. waters; the new provision makes it easier to enforce the mortgage if the vessel is overseas. *See* H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News

dies is a matter that arose only a handful of times during the Act's 68-year history, *see* p. 21, *supra*; and (4) this case does not involve an actual preferred ship mortgage, *see* p. 21, *supra*.

The third question is defective -- even apart from its merits -- for yet another reason: even if "the Ship Mortgage Act does not preempt *state* enforcement of contractual provisions for nonjudicial foreclosure" (quoting the question presented; emphasis added), the County's policy would nonetheless be preempted because it appears to go beyond what state law authorizes. There is significant doubt regarding whether California law allows the self-help seizure of a federally registered ship,[17] or whether it

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6114. The Washington Supreme Court inferred from this change "that the committee intended for a mortgagee to proceed under the Act even when the vessel was beyond the court's jurisdiction and not to have state law applied by default." *Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 95 (Wash. 1990). The change effectively seals state law out of a potential gap in the old Act's coverage, preserving the uniformity of federal law on preferred ship mortgages.

(3) The 1988 law strengthened notice requirements, § 31325(d); as Congress explained its concern: "[I]t is possible for a vessel to be sold without the holder of the preferred mortgage even knowing that the vessel was sold. The Committee believes that this defeats the purpose of preferred mortgages." H.R. Rep. No. 918, 100th Cong., 2d Sess. 21 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 6114. In the same way, self-help repossession results in a change of ownership (and often a change of location and use of the vessel) without notice to holders of preferred mortgages. It is inconceivable that Congress meant to permit unilateral resort to un-noticed self help -- a practice that would defeat the central aim of the legislation.

[17] California Commercial Code § 9104(a) provides that the State's self-help repossession provisions do not extend to "a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties and third parties affected by transactions in particular types of property." Comment 2 to this provision incorporates the Uniform Commercial Code note to the U.C.C.'s parallel provision, explaining that "[t]he Ship Mortgage Act of 1920 is an example of such a federal act." Thus, the California Commercial Code exempts from its self-help authorization provision mortgages that fall within the scope of the Ship Mortgage Act. Security agreements in California are enforceable *only* to the extent that they are authorized under the Code; common-law theories are expressly nullified. Commercial Code §§ 9501(1), 9501(3), 9201.

authorizes self-help repossession of *any* property where the possessor objects to seizure.[18] There are thus strong reasons to believe that this case does not even *involve* the question presented by the County. In addition, assessing the County's contention that its policy is consistent with state law recognizing "contractual provisions for self-help foreclosure," Pet. 19, and is therefore not preempted by the Ship Mortgage Act, would plunge this Court into the depths of the California Commercial Code. The state-law questions were not passed on by the Court of Appeal -- which held that the County's policy was preempted regardless of its status under state law -- but they would inevitably confront this Court if it were to consider the County's question presented.[19] The prospect of such state-law review by this Court, of course, raises grave questions under *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874), and the County's petition should be denied for that reason alone.

In any event, the County's policy in 1977 *was* preempted by the Ship Mortgage Act for two related reasons: (1) "it regulate[d] conduct in a field" -- foreclosure of preferred ship mortgages -- "that Congress intended the Federal Government to occupy exclusively," *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990), and (2) it stood "as an obstacle to the

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[18] *See* note 10, *supra*. California Commercial Code § 9503 authorizes self-help repossession only if it can be accomplished "without breach of the peace." Repossession over the debtor's protest or his request to leave the premises constitutes breach of the peace. *See, e.g., Hartford Financial Corp. v. Burns*, 158 Cal. Rptr. 169, 173 (Cal.App. 1979). Interpreting a statutory provision identical to California's, an Arizona appellate court, in a case involving a creditor who had merely secured the *presence* of a sheriff to prevent anticipated violence -- without any active role by the sheriff, and despite the possessor's failure to tell the sheriff that he objected to repossession -- held that the creditor had thereby breached the peace. *Walker v. Walthall*, 588 P.2d 863, 864-65 (Ariz.App. 1978).

[19] In addition, if the County's policy were found unlawful under state as well as federal law (an argument that respondent preserved below), then the fact that respondent was deprived of his property (the Magnifico II) without due process would be even plainer. *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92-93 (1876).

accomplishment and execution of the full purposes and objectives by Congress." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (internal quotations omitted).[20]

We have already noted the function of the Ship Mortgage Act in preventing a destructive race among creditors. *See* p. 22, *supra*. It is obvious that permitting a mortgagee to enforce self-help remedies would severely prejudice the interests of other possible mortgagees and creditors, who, without the elaborate notice provisions of the Ship Mortgage Act, might not discover that the vessel had been seized and sailed away by its new "owners" until it was too late.[21] Under the County's view, mortgagees could contract for (or even fraudulently procure, as in this case) an infinite variety of self-help remedies, thus placing the interests of other mortgagees at risk and discouraging the investment in shipping that Congress sought to promote. At the very least, a patchwork of self-help remedies that varied from state to state would utterly eviscerate the federal aim of a

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[20] County policy was also *expressly* preempted because the Act provided that a preferred mortgage "may be enforced by the mortgagee by suit in rem in admiralty" and further that "[o]riginal jurisdiction of all such suits is granted to the district courts of the United States *exclusively*." 46 U.S.C. § 951 (1982 ed.) (emphasis added). The presence of the word "may" indicates not that the mortgagee is free to disregard the foreclosure procedures prescribed by the Act, but only that the mortgagee is free to refrain from *any* foreclosure at all. *See Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 94 n.2 (Wash. 1990). If Congress had used the word "must," for example, then it would have implied that mortgagees were *required* to initiate foreclosure procedures, even if they did not desire to do so. Congress did not use the word "may" to eliminate the Act's preemptive effect, and in fact added the term "exclusively" in the next sentence of § 951 specifically to counter such an interpretation. *See Recording of Mortgages on Vessels and Subordinating Maritime Liens Upon Vessels for Necessaries to the Liens of Mortgages: Hearings on H.R. 8873 before the House Comm. on the Merchant Marine and Fisheries*, Pt. II, 66th Cong., 1st Sess. 93-95 (1919).

[21] Congress's decision to grant state courts concurrent jurisdiction over *in personam*, but not *in rem*, actions, Pet. 21 n.19, proves our point: *in personam* actions typically raise no "collective action" problem (and, to the extent they do, traditional bankruptcy protections are available).

"simple, clear, and definite" *uniform* procedure for the foreclosure of preferred mortgages in federally registered vessels. *Detroit Trust Co. v. Barlum*, 293 U.S. 21, 40 (1934).[22]

Not surprisingly, two recent courts (in addition to the California state courts) have squarely rejected the County's position. The Supreme Court of Washington, in a carefully reasoned, thoughtful and unanimous decision, held "that the Ship Mortgage Act provides the exclusive remedy for foreclosure of a preferred ship mortgage," and that private self-help repossessions are forbidden. *Nate Leasing Co. v. Wiggins*, 789 P.2d 89, 95 (Wash. 1990). The Northern District of California similarly concluded that there is "'simply no room for the operation of state law' on the issue of whether extrajudicial private sales are permissible." *Bank of America National Trust & Savings Association v. Fogle*, 637 F. Supp. 305, 307 (N.D. Cal. 1985) (quoting *Nat G. Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 506 (5th Cir. 1973)). The *Fogle* court

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[22] *See also Fourchon v. Louisiana National Leasing Corp.*, 723 F.2d 376, 383, 384 (5th Cir. 1984) (warning that the "application of state law to preferred ship mortgages [would] ten[d] 'to introduce an undesirable lack of uniformity'" and discerning "no relevant gaps in the federal scheme") (citation omitted); *Merchants National Bank of Mobile v. Dredge General G.L. Gillespie*, 663 F.2d 1338, 1347 (5th Cir. 1981) ("the [Ship Mortgage] Act applies exclusively and overrides state procedures, practices, and consequences"), *cert. dismissed*, 456 U.S. 966 (1982); *Bollinger & Boyd Barge Service, Inc. v. The Motor Vessel Captain Claude Bass*, 576 F.2d 595, 597 (5th Cir. 1978) ("even though state law may occasionally be used to fill gaps in federal maritime law, there were no such gaps in the Ship Mortgage Act"); *Nat Harrison Overseas Corp. v. American Barge Sun Coaster*, 475 F.2d 504, 506 (5th Cir. 1973) ("the Ship Mortgage Act provides a comprehensive scheme for the foreclosure of preferred ship's mortgages and any remaining deficiency judgments against the debtor personally; there is no room for the operation of state law"); *J. Ray McDermott & Co. v. M/V Morning Star*, 457 F.2d 815, 818 (5th Cir. 1972) (*en banc*) ("Congress intended that . . . the Act wholly and completely supersede state law and practice in every respect. . . . '[T]o engraft the various nuances of state law . . . would introduce an undesirable lack of uniformity' . . . . The Ship Mortgage Act . . . forms a comprehensive procedure for the foreclosure of a preferred ship's mortgage.") (citation omitted), *cert. denied*, 409 U.S. 948 (1972).

commented that "[i]t is more than a little disingenuous to say that when a statute specifically authorizes a specific, detailed procedure for something, that statute is deemed to be 'silent' on the question of whether *some entirely different procedure* can be substituted for it." 637 F. Supp. at 307 (emphasis added). *Nate Leasing* and *Fogle* are compelled by the long and steady line of precedent stressing the comprehensiveness of the Ship Mortgage Act and its creation of the exclusive remedy provided by a uniform federal foreclosure procedure.

Against this weight of authority the County advances one aberrant decision: *Brown v. Baker*, 688 P.2d 943 (Alaska 1984). *Brown* does not demonstrate the existence of conflict or confusion in the lower courts; to the contrary, *Brown* itself is the outlier, and the Court of Appeal in the instant case followed the clear (and settled) majority rule in concluding that County policy violated the Ship Mortgage Act. There is no reason to review *this* case in order to reverse the obvious mistake made in *Brown*, where the Alaska Supreme Court cited none of the key precedents concerning the Ship Mortgage Act, and *not one* of this Court's preemption decisions. *See* 688 P.2d at 949. *Brown*'s fallacy is highlighted by the Alaska court's acknowledgement that the Ship Mortgage Act preempted state *judicial* foreclosure proceedings with respect to federally registered ships, regardless of any attempt by the parties to provide for state foreclosure by contract. *See* 688 P.2d at 949. The County in this case made the same concession before the Court of Appeal. *See* Appellant's Reply Brief before the Court of Appeal, at 8. Yet the Alaska court nonetheless maintained that the Act did not preempt *private*, self-help remedies. This overlooks the glaring fact that, having deemed state courts too non-uniform and irregular to enforce preferred ship mortgages, Congress could hardly have found adequate the even less regular process of individual self-help with no judicial supervision. If, as the County has taken great pains to insist, the Ship Mortgage Act is a relatively obscure law, then there is no basis for assuming that Congress meant to entrust repossessions to the local cop on the beat, rather than (as the Ship Mortgage Act provides) to United States Marshals and federal district courts. Thus, in *Nate Leasing*, the

Washington Supreme Court specifically addressed *Brown* and unanimously found its reasoning unpersuasive. *See* 789 P.2d at 93. There is no need for this Court's review.

CONCLUSION

At bottom, the County's petition for certiorari rests on a poorly camouflaged plea that this Court protect it from the fiscal consequences of a supposedly "extraordinary damages award[]," Pet. 9, despite the Court of Appeal's careful examination of the damages issues raised below by the County (which it has abandoned here), and its unanimous affirmance of the award in full. App. 27a-33a. The Supreme Court of California rejected a similar plea by the County in declining to review its petition; there is no reason for this Court to show the County greater solicitude. In truth, the size of the judgment is largely a function of mounting interest (at a statutory 10 percent rate) and of continuing lost profits (at a daily rate of $901.36) whose accumulation is attributable to the County's *own* delay in paying a judgment entered against it in 1986. It is in the interest of the County's own taxpayers, if not in the interest of its officials who might prefer to delay indefinitely the day when they will be held accountable by those taxpayers, that this case finally end.[23]

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[23] This petition is not the County's only attempt to postpone the day of reckoning when its taxpayers will see the final bill for the County's unlawful policy. Although the judgment in this case became final for purposes of California law after the California Supreme Court denied review on October 3, 1991, the County subsequently commenced a collateral attack on the interest rate in the Superior Court's 1986 final judgment, specified at 10 percent, arguing that state law permitted only an interest rate of 7 percent. *See* Pet. 8-9 n.11. The County omits to mention that on December 30, 1991, the Superior Court denied the County's motion, noting that the County had "had myriad opportunities to raise the interest rate issue in the six years since the judgment was entered" and that it could not be excused for its failure to object to the 10 percent rate at trial, on appeal, or in the California Supreme Court. The Superior Court observed that "[n]othing precluded an earlier and more appropriate attack" and added that the County had "fail[ed] to present any 'exceptional circumstances' to explain its failure to raise this [interest rate] issue earlier during the appeal process." *Meilicke v. County of Los Angeles*, WEC 056172 (Super. Ct., Dec. 30, 1991). On January 16, 1992, the County filed a notice of appeal from the Superior Court's ruling.

The petition for certiorari should be denied.

Respectfully submitted,

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February 4, 1992

SUPPLEMENTAL APPENDIX

Excerpts from trial transcript
(Reporter's Transcript ("RT"))
in *Meilicke v. County of Los Angeles*,
No. WEC 56172 (Cal. Super. Ct. 1984).

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I. EVIDENCE AND COURT FINDINGS CONCERNING LIES BY COUNTY OFFICERS ABOUT THE ALLEGED THREAT OF VIOLENCE

Statement of Trial Judge on Plaintiff's Motion for Directed Verdict (RT 1881-82):

THE COURT: There are a lot of things that I think I want to say, and yet, I am not sure I ought to say. There have been many witnesses in this case and a lot of people have taken liberties with the truth in this case. I think I will comment on only one.

When Mr. Sherrill testifies, in the face of the picture that all of the defendants' witnesses are painting this near-riot going on, people threatening to kill each other, and he testifies that he sees one of the participants in that melee pass a gun to another and never says anything about it to anybody, never does anything about it at all, he is either an outright liar or the biggest fool I have ever seen in my life.

What kind of law enforcement is that? Guns in the middle of a melee where people are threatening to kill each other and he does nothing about it.

Now, the answer to that is I simply do not believe that ever happened. I believe Mrs. Compton and Mr. Compton when they say there was no gun, because otherwise, I have to believe that we have hired a hopeless incompetent as a protector of the peace. There just is -- if a law enforcement officer -- no, I don't want you to say anything more -- sees such a thing and does nothing about it, the term dereliction of duty does not even begin to cover such a situation.

Now, that may give you some indication of the way the court has received most of the defendants' case. I am getting down to a disposition of it.

Direct by Plaintiff's Counsel to Deputy Cowen (RT 261-62):

Q: Was there anybody on the boat with Mr. Compton that was threatening him?

A: Not that I remember.

Q: The people who were -- anybody at the dock was about 75 or 80 feet away, right, at the gate?

A: Yes.

Q: The gate is a pretty long distance away; is that right?
A: Yes.
Q: There was no immediate danger that they were going to come down and engage in fisticuffs with Mr. Compton, was there?
A: I didn't know of that.

(RT 280-81):
Q: At the time you left the scene Lieutenant Baca was there?
A: Yes.

* * *

Q: So things had quieted down, so you didn't think there was any more danger of violence?
A: Well, I wouldn't have left if I thought there was.
Q: All right. And you left, turning over the handle to Lieutenant Baca?
A: Yes.

Direct by Plaintiff's Counsel to Lt. Baca (RT 1031-33):
Q: [Y]ou gave [this] declaration in the capacity of being a lieutenant in the Los Angeles County Sheriff's Department?
A: Yes

* * *

A: [Reading from Exhibit 18, the declaration signed by Baca] "Compton agreed to leave the vessel peaceably and orderly and no arrest was made."
Q: Read the next paragraph, please.
A: "While in my presence I observed no breach of the peace and no threats of violence by either party involved."
Q: [R]ead the last paragraph, please.
A: "I declare under penalty of perjury the foregoing is true and correct to the best of my knowledge and understanding and that this declaration was executed in Los Angeles, California on December 22, 1977."

II. EVIDENCE AND ADMISSIONS CONCERNING THE COUNTY POLICY THAT WAS APPLIED

Closing Statement of Defense Counsel (RT 1738-42):

Let's assume that -- we know for a fact at some point in time Mr. Davis and Mr. Nicoletti decided that they were going to repossess this boat. Let's assume that they are sitting around and they say to themselves, "God, it is a great day. It is November 10th, 1977. What are we going to do today? Well, why don't we go and repossess a boat. Now that's a great idea." So they get in their cars and they drive down to the marina, but they have one major problem. There is a guard on board the boat that they want to repossess and this guard has orders not to allow anyone on board.

So they probably say to themselves, "Well, if we try to take possession of this boat we might get hurt. So how are we going to prevent that particular event from occurring?"

So Mr. Davis has a devious mind, after all he is a lawyer and he comes up with a plan -- (Laughter)

He comes up with a plan and he says, "Well, that's no problem. Let's get the sheriff to do it for us." And he explains his plan. "God, that's a great idea. Do you think it works? Trust me," says Mr. Davis. "It will work." So they then proceed to the sheriff's station and that's where our story begins and that's where we know the facts start.

Mr. Davis, Mr. Nicoletti walk into the sheriff's station and they ask to speak to the individual in charge. We know that that person was Mr. Baca and Mr. Davis says, "Well, we want to repossess a boat today." Captain Baca knows what the policy of the County of Los Angeles is and he says to Mr. Davis and Mr. Nicoletti, "Look, the Sheriff's Department cannot, does not and will not become involved in a civil repossession."

Now, at this point Mr. Davis begins to put his plan into operation. He tells Captain Baca, "Captain Baca, You don't understand, the boat we want to repossess has a guard on it and that guard has orders not to allow anyone on board," and he explains that there is bad blood between his client and the people who own the boat and he takes it one step further. He says, "We want to make a citizen's arrest of that guard for trespassing."

Well, bingo. He has said the magic words. He has immediately placed Captain Baca in a double dilemma.

* * *

Captain Baca also knows that any citizen can make a citizen's arrest of any other citizen for whatever reason he wants, right or wrong, and he also knows that if a citizen chooses to make a citizen's arrest of another person, rightly or wrongly, the sheriff or any peace officer is required to take that person who has been arrested into custody, and knows that if the sheriff does not take that person into custody pursuant to that citizen's arrest, then the sheriff commits another crime.

* * *

Captain Baca knows that he can't tell Mr. Davis or Mr. Nicoletti not to go down to the boat, because, after all, they have a constitutional right to go anywhere they want to go and he can't tell them that they are not allowed to exercise the right of citizen's arrest, a right which the law gives them. Davis and Nicoletti produced a document called a preferred ship mortgage and they say, "It is on the strength of this document that we are going to do what we want to do."

It does not make any difference whether the document is, in effect, valid or invalid, whether or not it gives them any rights to do anything so long as Mr. Davis and so long as Mr. Nicoletti believe they could do what they wanted to do; right or wrong, they could do it and there is nothing the sheriff could do, but Lieutenant Baca did have an alternative. He could try to talk them out of doing what they were wanting to do.

(RT 1750):

So what did they do? Mr. Davis executed his plan he decided on earlier and that was he would make a citizen's arrest of Mr. Compton for trespassing and he wanted to make a citizen's arrest of Mr. Compton for grand theft boat or trespassing and again, right or wrong, he can do it, and, right or wrong, once he does that, once he attempts to do that, the officers have to remain, the officers have to take the person into custody.

If the officers don't they have committed a crime and again Mr. Davis, Mr. Nicoletti placed the Sheriff's department in that dilemma.

(RT 1755):

So, my whole point, ladies and gentlemen, is that Mr. Compton was not allowed to leave that boat, to leave that area, because the sheriff had no choice. The sheriff had to do what Mr. Davis and Mr. Nicoletti were insisting upon.

Questioning by Trial Judge of Defense Counsel On the County's Motion for Directed Verdict *(RT 1872-75)*:

THE COURT: Let me ask you this question. In view of the testimony of all of the people who were asked on the subject that they never received any specific training with respect to preferred ship mortgages, and in view of the law that before there can be a repossession under preferred ship mortgages there must be a filing in the federal court and U.S. Marshal's activities and all of that, what would your answer be to this question:

If there had been such training and Captain Baca knew about that, would what happened have happened because he would have known there has been no federal action filed, this is not the United States Marshall bringing me this stuff. Nobody has said to the master, "We have filed against the ship." How do you respond to that?

* * *

MR. GALLAGHER: Let's assume that Captain Baca were trained specifically and knew --

THE COURT: And he knew that under the preferred ship mortgage there had to be all of this federal work done --

MR. GALLAGHER: Correct.

THE COURT: -- would what happened have happened?

MR. GALLAGHER: If Nicoletti says, "I want that boat and I am going to exercise my rights to take that boat," Captain Baca does not have the right even if he is trained in preferred ship mortgages to say to Nicoletti or Davis, "No, you can't do that." He's got no right to intercede. They can do whatever they want to do. They may commit a crime. They may commit a tort. But after they commit the act, then the officer can make an arrest or do whatever. But he can't prevent them from doing what they want to do.

Oral Findings of the Trial Judge *(RT 1884)*:

THE COURT: [A]lthough that in itself is not an official policy, that is a semantic way of expressing it, and I think [this was a] situation where deprivation of constitutional rights, and there is no question that there was deprivation of constitutional rights on November the 10th, 1977, was bound to happen and is bound to happen again, and for that reason I find for the plaintiffs and against the County of Los Angeles.

Direct by Plaintiff's Counsel to Deputy Smith (RT 398-400):

Q: What option were you explaining to [Compton]? What could he do to avoid arrest?

A: That in California --

Q: What could he do to avoid arrest? What option was it that he could do to avoid arrest, sir?

A: He could not place himself in a position of trespassing so that he could get arrested for a misdemeanor by another private citizen.

Q: Well, what would he do to not place himself in a position of trespassing?

* * *

A: He could take himself out of the environment that was perceived to be trespassing by whoever arrested him, whoever could arrest him.

Q: Is that a fancy way of saying "get off the boat"?

A: Not to me it is not.

Q: Do you mean get off the boat, he could get off the boat so he wouldn't be on the boat and be subject to arrest for trespass?

A: I wanted him to be clear of his option to get off the boat and to sidestep getting arrested.

* * *

Q: [D]o you mean by that that he wouldn't be subject to arrest if he vacated the vessel?

A: That's correct.

Q: Thank you. Although there is another option that was available, isn't that correct?

A: I don't know.

* * *

Q: Did you have in mind to be advising the occupant of the boat that to place himself -- to take himself out of the environment by removing the vessel, did you have that in mind?

A: That's not an alternative, in my perception. By him removing the boat he is not taking him out of the area where he is vulnerable to arrest. He is still on the boat. He is still trespassing, whether he is outside of the breakwater or in the slip.

Q: That means, in order for your interpretation of that to be true, then, sir, you believed the boat was Mr. Nicoletti's; is that correct?

A: No, that's not true.

* * *

Q: That was not your understanding?

A: I had determined that Mr. Nicoletti had felt that he was [the owner]. Therefore he was capable of placing the security guard under private person's arrest.

(RT 458-59):

Q: [W]hat was said between you and Lieutenant Baca concerning the reading of [the preferred ship mortgage to Sandy Sanderson, Mr. Compton's guard on the ship on the day in question]?

A: I can remember two items that Lieutenant Baca told me. The necessity to read him items on the document and a reminder that our posture is that of -- we just want to be nice to this guy . . . . I wanted him to be clear that the Sheriff's Department does not want to impose upon Sanderson's right as a citizen. We just want him to be clear about a private person's arrest and his vulnerability that anyone can arrest anyone else whether or not a crime has been committed.

(RT 529-30):

Q: Do you understand that with respect to this preferred ship mortgage that Mr. Compton was entitled to, if he objected to turning over the ship to Mr. Nicoletti, did you understand that he was entitled to a court hearing?

A: No.

Q: Did you understand that he was entitled to due process before the ship could be taken away from him?

A: No, not really.

Direct by Plaintiff's Counsel to Lt. Baca (RT 914):

Q: [I]t is your understanding on November 10, 1977 that your understanding was that parties could contractually waive the right to due process. That's what you said your understanding was; right?

A: Absolutely.

Q: . . . [A]nd in conjunction with the incident at hand, that you were provided with documents that indicated to you that Mr. Nicoletti could obtain a court order if he wanted to?

A: No, no.

Q: Isn't that correct?

A: No, that doesn't say that in the document.

Q: No, that was your understanding of due process relative to those documents that Mr. Nicoletti could obtain a court order to enforce his rights; didn't you just finish saying that, sir?

A: Certainly that's an option he has.

Q: But he did not have to obtain a court order to enforce those rights?

A: According to the preferred ship mortgage, that's correct.

Q: And your understanding of due process was that Mr. -- then isn't it true that Mr. Compton or the Rexroats, the other parties, had waived their right to due process? The other parties had waived their right to due process?

A: Yes, you are correct.

(RT 917):

Q: Did you understand at any time that Mr. Compton objected to the repossession of the vessel? Any time that day, November 10th?

A: Mr. Compton at the boat objected to the repossession.

Q: And at that point, then, under your idea of due process, didn't you understand that Mr. Nicoletti was required under the law to obtain a court order in order to repossess it?

A: Mr. Nicoletti, as I have testified earlier, was not and is not required to acquire a court order.

(RT 945-46):

Q: Well, let's say, for example, that I came up to you and I had a document that gave me an interest in Mr. Gallagher's car, and Owen Gallagher [defense counsel] was in the car and I came up to you and I said, "Look, arrest that man. I am making a citizen's arrest to put him into custody."

Would you understand that based on my representations that you would be obligated to do so?

A: I would be obligated to do so by law, not necessarily because your representations are correct, but the law requires me to do that, whether they are correct or not.

(RT 947-48):

Q: [W]asn't it just as ridiculous for you to send down a

deputy sheriff to tell Mr. Sanderson that he was going to be arrested unless he got off the boat?

A: We didn't do that. The purpose of sending Deputy Smith to the guard was to inform the guard, just as Deputy Smith stated in the tape, that this is what the basis behind the citizen's arrest would be. That it is not a Sheriff's Department decision, it is not a Sheriff's Department authority that's compelling this arrest; Mr. Davis or Mr. Nicoletti, either one, that intended to do this.

If in the repossession of the ship the guard stands in the way.

(RT 986):

Q: Now, assuming that that preferred ship mortgage was valid on November 10, 1977, and assuming that Mr. Nicoletti went to repossess the boat and Mr. Compton objected, what were Mr. Nicoletti's rights as you understood them on that day?

A: To repossess his boat.

Q: Over and above Mr. Compton's objection?

A: Yes.

(RT 1001):

Q: Now, let's say hypothetically that Mr. Compton had objected to the repossession by Mr. Nicoletti. What was your understanding of what Mr. Nicoletti's rights to repossess the boat were at that point?

A: That he had the right to do it.

Q: And could he board the boat while Mr. Compton was on it?

A: Absolutely.

(RT 1004-06):

Q: [Quoting from Exhibit 17, Field Training Guide used at Sheriff's Academy]: I would like to read [the] next section under "Buyer's Rights." Quote:

"The buyer has a right to object to the repossessor's taking of the property. This objection may be oral or by conduct . . . . '[I]f the buyer is in personal possession of the [property] and protests against such repossession and attempts to obstruct the seller in doing so, it becomes the duty of the seller to proceed no further . . . and to resort to legal process.'" [Citation omitted].

* * *

Q: Now, where were you trained as a Los Angeles Sheriff?
A: At the Sheriff's Academy.

* * *

Q: Now, was there any -- did you have any doubt that Mr. Compton, either verbally or by his conduct, was objecting on November 10, 1977 to Mr. Nicoletti's repossession?
A: He was definitely objecting. There is no doubt about that.

* * *

Q: Wasn't it your understanding that once on November 10th, that once Mr. Compton objected to Mr. Nicoletti taking his vessel, that your duty was to advise Mr. Nicoletti to go to court and get a court order?
A: No, the law regarding the matter is the department's policy, not this training bulletin. This is a guide to provide deputies information that gives them the ability to make situational decisions based on circumstances at hand, and if you read further into the document you will find that kind of commentary made.

Direct by Defense Counsel to Lt. Baca (RT 1636-38):
Q: Did you believe in good faith, Captain Baca, at the time that you took these actions, that your acts were in accordance with your official duties as an officer for the Los Angeles County Sheriff's Department?
A: Yes.
Q: Do you still believe that?
A: Yes.
Q: And if you had to do it over again would you have done it any differently than you did?
A: No. No, I don't think so.

III. EVIDENCE SHOWING THAT RESPONDENT OBJECTED TO THE REPOSSESSION, AND INFORMED COUNTY OFFICERS OF THE UNDERLYING EXTORTION

Trial Judge's Comments During Pretrial Proceedings (RT 53):

THE COURT: Let's try to put the stipulation on the record at this time. It is my understanding that it is stipulated by and between counsel at this time, said stipulation later to be read to the jury at whatever time we deem it appropriate, that the preferred ship's mortgage, which was exhibited to the defendants on the day of the incident in question, has since been judicially determined to be invalid as having been obtained through coercion, the facts of which invalidity were not apparent on the face of the document at the date, time and place in question.

Direct by Plaintiff's Counsel to Richard Compton (RT 1191):

Q: What connection did you come to know Mr. Sanderson in?

A: I hired Sandy Sanderson as a guard to stay aboard my boat and protect my boat from Franco Nicoletti and these gangster associates of his.

Q: Had Mr. Nicoletti tried to take possession of the boat prior to that time?

A: Twice.

(RT 1211):

Q: Now, going back to November 10, 1977, what was your first contact with any problem concerning the Magnifico?

A: On November 10th.

Q: Yes.

A: I was at my apartment with my wife and I got a call from Sandy Sanderson, my guard aboard the Magnifico II.

* * *

Q: What did Mr. Sanderson say?

A: Mr. Sanderson told me that Franco Nicoletti and his attorney and his brothers were down at the boat and they were trying to take possession of the boat, and I told him to pull the gangway up and I would be right down.

(RT 1215):

Q: What did you do when you went into the [ship], if anything?

A: Sandy gave me these documents, the preferred ship mortgage. As soon as I saw it I knew what they were.

(RT 1218):

Q: Now, when you saw and recognized the documents when Sandy gave them to you --

A: Oh, absolutely.

Q: Had you signed those documents?

A: Well, yes, I had signed those documents, yes.

Q: Are these the documents upon which the judgment that we have a stipulation with respect to the judgment refers to that were obtained by extortion?

* * *

A: Yes.

(RT 1219):

Q: Okay. Now, Sanderson handed you the documents, you recognized the documents and what happens next?

A: Well, Sanderson was telling me that the sheriffs were threatening to arrest him and if he didn't give up the boat, didn't get off the boat.

* * *

I said, "Sandy, stay here. Leave the gangway up. I have got to call my attorney, Carlton Russell, right away." He is an admiralty attorney.

(RT 1222-23):

Q: After you had the conversation with [Russell], what did you do?

A: [B]ased upon what I was told to do, I told Sandy to go down, start the engines of the vessel, and to prepare it to take it out of the slip.

(RT 1237):

Q: And did you then have a conversation with [the owner of the neighboring ship,] Mr. McMillan?

A: Yes, I told Pat what was occurring. I said, "These people obtained this document by putting a gun to my head and threatening the lives of my mother-in-law, myself, and my wife and the Sheriff's Department is down there demanding that I give the boat up," and I talked to my attorney and my attorney had recommended that I take the boat out.

I was really confused. I said, "What should I really do?" I got police officers on the dock with guns and making all of the threats that they are going to arrest you and Pat says, he said, "Well, you got a federally-documented vessel. Take the boat out. Once you are away from the dock what are you going to do? You can argue about it later on."

(RT 1240):

Q: Now, when did you, if at all, begin to speak over your P.A. system?

A: I didn't start speaking over my P.A. system until I had actually backed the vessel out of the slip and pivoted the boat to head it toward . . . the main channel.

At that time, as soon as the boat was directed toward the main channel, then I was free to use the microphone and start speaking to the Sheriff's Department who were on the dock and were up on the street level.

(RT 1243-44):

Q: On the P.A. system, what did you say?

* * *

A: I told [the Sheriff's Department] they were making a big mistake. I told them the documents that they were trying to enforce, the preferred ship mortgage, had been obtained as a result of threats of death upon the lives of my wife and my family and that I had filed a criminal complaint with the Lennox County Sheriff's Department and I told them to ask [Deputy] Cowen, because he knew about these fraudulent, these forged [Department of Motor Vehicles] documents that they had.

And I told them Nicoletti was a crook and that he was involved with organized crime, that they had no right to do what they were doing and they were making a big mistake and that I was not going to give up possession of my boat.

I said a lot of other things.

(RT 1248):

Q: What took place [in the main channel]?

* * *

A: I walked over to the side and I said [to the sheriff's deputies], "these guys are trying to take my boat away from me [with] documents that they obtained by threatening my family's life."

I said, "You guys are making a big mistake." I mean, check with Lennox. Check with the Harbor Patrol."

(RT 1261-62):

Q: What did you do [after you returned the ship to the slip]?

A: I called Lieutenant Baca directly."

* * *

Q: And what was said between you two?

A: told Mr. Baca that, "Mr. Baca," I said, "these deputies are making a big mistake. I own this boat and I have got documentation to prove it. This document has been extorted."

He said, "Look, I don't know anything about that. The boat belongs to Nicoletti. Those documents say he has a right to possess it. If you don't leave the boat you are going to be arrested.

That's just exactly what Mr. Baca said.

(RT 1307-12)

Q: Tell us what was said [between you and Baca at the sheriff's station]?

A: I asked him why he had taken me off my home, off my property, and why he had turned it over to Nicoletti when I was the owner of the boat. What was he doing with this preferred ship mortgage? I said, why didn't he arrest Nicoletti. He is the crook. I said, Why don't you check out all of the things I have been telling you? Check out the grand theft complaint that's on file over there. Why don't you ask Deputy Cowen? Why don't you ask Deputy Smith? Why don't you at least allow my wife to go home to get the documents showing my ownership of this boat?

* * *

Q: What did Lieutenant Baca say, to your recollection, while you were at the sheriff's station?

A: I reiterated to -- well, I was telling Baca the story of all of the previous attempts by Nicoletti and all of the threats on our lives

and how they obtained this mortgage by extortion, how they threatened our lives, threatened to kill us the two prior attempts and the report that I put on there. . . . Baca didn't want to hear it. He says, "The documents says the boat belonged to Nicoletti," didn't want to hear it at all. He said, "Talk to somebody else. You contact your attorney about that. The document says that Nicoletti owns the boat."

I tried to argue with the man, but it is pretty hard to argue with a badge of authority once they make up their mind.

* * *

Q: Did you tell Lieutenant Baca about what the Magnifico was?

A: I expressed to Mr. Baca how much equipment -- I had over half a million -- I had almost three-quarters of a million dollars worth of personal belongings on this boat, recording equipment and cameras and developing -- things I had collected all of my life. Worked all of my life to acquire. Almost 40 years. Every dime I had. Every day I was spending with that boat. That boat was my life.

* * *

A: . . . I told him Nicoletti had no court order. They had no right to do this. They had no right to take me out of my home, kick me off of my property, take my home away from me, and my business away from me.

Q: What did Lieutenant Baca say, how did Lieutenant Baca respond to that, if he did at all?

A: Mr. Baca ignored me in a very nice way and just asserted, he said, "Mr. Compton, you are going to have to take this matter up with your attorney and the documents say that the boat belonged to Mr. Nicoletti and Mr. Nicoletti is full within his rights to take possession of the boat," and he said, "We are not going to detain you at this time." He said, "We are going to let you go, but if you go back to the boat, I am going to see that you are arrested and you are going to go to jail."

That's exactly what the man said.

I asked Mr. Baca if he would impound the boat, put a guard on it, my own guard, put another guard on it or one of the sheriff's guards or a marshal or something, on the boat to protect my property.

He said, "We are not in that business. We don't do those

things." They had no place to take and put the boat. I asked him to leave it in the slip right where it is but don't put a crook's guard on the boat. Don't let Nicoletti have my boat. But that's what they did.

* * *

Q: When you had possession of the boat and you were taking it out, what was your understanding of your rights to maintain your possessions?

A: Just like any other piece of property. I was in possession of the property and I believe that as any citizen does, that he has a right to contest any adversary position that's brought against him and I believe that he is entitled to a hearing.

Q: Did you intend to voluntarily relinquish any right that you had to maintain possession of the Magnifico at any time on November 10th?

A: Absolutely not, no, I did not. I was forced off that boat.

Direct by Plaintiff's Counsel to Dawn Roddenberry Compton (respondent's wife) (RT 1466-68):

Q: Okay. Then what took place?

A: Rick took me into the main salon -- called the living room -- and he explained to me that he had just brought the boat back and that the sheriff's department was trying to give possession of the boat to Nicoletti.

* * *

Q: Did he give you any instructions as to whether or not to let the boarding ladder down no matter what the sheriff said.

* * *

Q: What's the next thing that you remember?

A: Next thing I remember there were two deputies behind me chasing me around the boat.

Q: Now, was there any communication between you and the deputies?

A: Yes.

Q: What was said?

A: They told me that I would have to either get off or be arrested.

Q: What did you say?

A: I said, "I am not leaving my boat. This is my home. I am

not leaving."

Q: What did they say, if anything?

A: They say, "You either leave or we are going to arrest you."

Q: Just tell us what took place.

A: They chased me around till I got to the boarding ladder, one got in front and one got in back and they took me off the boat.

(RT 1470):

Q: Well, did they touch you or did they just invite you off at that point?

A: No. They touched me and they took me off. They grabbed me by the wrist and led me down the gangplank and then when I got down to -- on the dock they both took me by both wrists and held me really hard. I didn't start walking because I wanted Rick to know they were taking me. I started yelling, "Help, help, Rick, Rick." They started walking and they started dragging me along.

(RT 1475):

Q: When you left, where were the Nicoletti party?

A: They were on board the boat by then.

Q: They were on board the boat?

A: Yeah.

Q: You saw them board the boat?

A: I saw them board the boat with deputies.

Direct by Plaintiff's Counsel to Dennis Fields (RT 696):

Q: And was Mr. Compton broadcasting on his P.A. system the entire time while the Magnifico was underway?

A: Yes, he was.

Q: Okay. Now, what was he saying if you recall?

A: He was making statements that he had reported that the Magnifico had been trying to be taken by Franco Nicoletti in the past. He had reported that to the sheriff's department and the Harbor Patrol, I believe, and that he was not bringing the Magnifico back, and at the same time the Harbor Patrol boat saying, "You bring the boat back, turn it around or we are going to board you and place you under arrest."

(RT 707-08):

Q: What was he saying?

A: He stated that the only reason he is going to stop and turn the boat around is under threat of duress and arrest.

Q: And he had been broadcasting all along this way down the channel; is that right?

A: Yes, all the way down, yes, sir.

Q: Was he saying -- what was he saying all the way down the channel, if you remember, if he was saying anything that you remember?

A: I don't recall everything exactly, but the gist is that he had filed a report that the boat had been taken from him before and he wasn't going to let it happen again and that he had been threatened at gunpoint and had the [boat] taken away from him, and he was not going to let the Mafia and the racketeers take the boat away from him again. It was his.

Direct by Plaintiff's Counsel to Lt. Baca *(RT 917)*:

Q: Did you understand at any time that Mr. Compton objected to the repossession of the vessel? Any time that day, November 10th?

A: Mr. Compton at the boat objected to the repossession.

(RT 998):

Q: You understand that Mr. Compton was objecting to Mr. Nicoletti's repossession; isn't that correct?

A: Yes.

(RT 1005):

Q: Now, was there any -- did you have any doubt that Mr. Compton, either verbally or by his conduct, was objecting on November 10, 1977 to Mr. Nicoletti's repossession?

A: He was definitely objecting. There is no doubt about that.

IV. EVIDENCE DEMONSTRATING THAT THE PROCEDURE MANDATED BY THE SHIP MORTGAGE ACT WAS OBVIOUS IN 1977, AND THAT LT. BACA KNEW OF IT

Direct by Plaintiff's Counsel to Carlton Russell (RT 1362-64):

Q: You do recall -- can you tell us about that telephone call?

A: I got a call from Mr. Compton concerning the boat Magnifico II and the fact that people were trying -- I think it was the sheriff's department was down there to put somebody else in possession or take over his boat, and I responded to his inquiries and made certain inquiries of him.

Q: Can you tell us what he said to you and what you said to him, as best you can remember, please?

A: Well, it is as best I can remember, but the substance is clear to me in this sense. He was concerned about, "What should I do? These people are down here with a piece of paper." And I was concerned as a lawyer and I really didn't view it as an attorney/client relationship so much as a former client with a problem I am supposed to have some familiarity with, asking, you know, "What should I do?"

And I said, "Well, what is the piece of paper?" Because I wanted to know, it makes a big difference, and it turned out it was not a warrant for arrest of the vessel, which is the customary legal process issued out of federal court. And I think I really expected they had and then it turned out it wasn't the marshall, it was the sheriff, because I think a marshall as the United States Marshall who serves federal processes, and he finally explained to me or at least talked to me about it. It was a preferred ship mortgage and described a little bit about it.

I said, "Is that all?" And he said, "Well, yes." I said, "You mean there is no court process, there is no warrant of arrest, right of attachment," words to that effect. And he said, "What should I do?" And I said -- near as I can recall and certainly in this context, I said, "Well, I think I would get underway," meaning, you know, let's go to sea.

Q: Now, did Mr. Compton describe the paper as a preferred ship mortgage?

A: I don't specifically recall, but I was satisfied that it

certainly could have been, would have been consistent with my response.

Q: Did he describe to you the manner in which the preferred ship mortgage came into being?

A: Yes. He told -- I don't recall specifics, but it had to do with signatures either at gunpoint or some sort of lack of arms-length negotiation, because he must have told me it was a preferred ship mortgage or a document purporting to be that, because I said it doesn't matter to me whether it is duress or not, you know, it wouldn't make any difference in what my thought was.

Q: Why wouldn't it make any difference?

A: Well, from my background and experience, no one, that is, no lawyer advising a client seeking a remedy, assuming that the mortgagee is the person who wants to take the boat, wants that done other than by court process.

(RT 1367-70):

Q: Now, with respect to the rights, you talked about the fact that you get a complaint warrant of arrest and the marshal arrests the boat and takes it into custody.

A: Then there is a court hearing. I forgot to say you got to give the marshal these days $5,000 in advance or he won't move. Used to be $500.

* * *

Q: So, for example, in this case, it has been established that the document that you have before you was obtained by extortion. If there had been -- whether or not that was a validly executed document would have been -- could have been a subject of the hearing, the court hearing that you have just described?

A: Well, yes, matter of fact, and I should have mentioned this -- if there is anything wrong with the -- that is if the vessel owner thinks, "Hey, this is not a valid claim against my vessel and it is under arrest," he can go in for an immediate hearing before the judge to get the whole warrant of arrest vacated. There is a whole concept of law on unlawful arrest or it is not arrest in the sense that one person taking another in custody, but the court is open to determine whether or not that warrant of arrest should have been issued. There is a movement in effect to even require a judicial officer to look at it before it is issued, but that's not occurred yet.

(RT 1371-73):

Q: [D]id [Mr. Compton] give you any telephone numbers

A: He asked me, almost entreated me to call the sheriff's office, gave me a number and I did call the sheriff's office to kind of explain why they shouldn't be doing this, and if I didn't say it at least I thought -- I am not going to presume to tell the sheriff how to do his job, but I thought I might be able to at least find out what was going on because, frankly, I wanted also to make sure that we were only talking about a preferred ship mortgage document, that there wasn't some court process slipped in there that I was overlooking, because I would not want him to defy a court order.

* * *

Q: Did you speak with someone at that number?

A: Yes.

Q: Did that person indicate to you that they knew what you were talking about?

A: They were conversant with the facts.

* * *

A: I asked him what court process, if any, they were using. They said, "No, [the mortgagee's] got a document that says he has a right to take it over." And I told him I thought he ought to check with the Coast Guard, that that is not the purpose of the document he described.

Cross by Plaintiff's Counsel of Lt. Baca *(RT 1645-1646)*:

Q: You did speak with an attorney and he called you?

A: Yes.

* * *

Q: Did you ask him why he was calling you?

A: No. No, I didn't ask him why.

Q: Did he advise you that -- you heard Mr. Russell's testimony. Were you here when he testified?

A: Yes, I heard Mr. Russell's testimony.

* * *

THE COURT: Did you have the kind of conversation that Mr. Russell described having had with somebody at the Sheriff's Department while he was here testifying?

THE WITNESS: Yes. We discussed some points concerning maritime -- what you call maritime law.

Supreme Court, U.S.
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No. 91-1157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

COUNTY OF LOS ANGELES,
Petitioner,

v.

RICHARD MEILICKE,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Desperate to sustain a judgment in excess of $9 million against the County, respondent's 30-page opposition to the County's petition for certiorari (plus 21-page "appendix") offers every conceivable argument against review in this Court—except a defense of the theory of Section 1983 liability on which that judgment was based. Thus, the vast majority of respondent's brief is devoted to non-existent jurisdictional obstacles (Opp. 4-5, 20-21), mischaracterizations of the decision below or of petitioner's argument (*id.* at 6-15), and attempts to sow ambiguity and confusion regarding the factual basis for the judgment (*id.* at 2-4, 21, 23-25). What respondent cannot obscure, however, is that the theory of Section 1983 liability adopted by the court below—which exposes local governments to extraordinary damages awards based upon lawful policy choices—is a matter of recurring significance and is legally indefensible. Despite respondent's legal and logical gymnastics, the fact remains that this case presents three separate and important questions of federal law, each of which is worthy of review by this Court.

STATEMENT OF THE CASE

Respondent takes 51 pages, including extensive quotations from the record, to support his thesis that this case involves nothing more than "fact-bound application of settled law." Opp. 4. However, review of less than two paragraphs of the decision below demonstrates that the judgment under review actually rests upon a series of cleanly presented, although wrongly decided, legal issues:

> [Petitioner] did have a policy to permit self-help in civil repossessions if the parties waived due process rights and that policy was applied here. . . . There being a policy, the question is whether . . . this policy violated plaintiff's federal statutory rights.
>
> The rights at issue are those contained within the Ship Mortgage Act of 1920.

Pet. App. 18a. The questions presented are (1) whether, in the circumstances, the County's facially lawful "policy" may form the basis of municipal liability under 42 U.S.C. § 1983; (2) whether the "rights at issue" are enforceable under Section 1983; and (3) whether the Ship Mortgage Act preempts the application of the "policy" in question to preferred ship mortgages. Pet. i. Respondent's lengthy exposition of the record never demonstrates that this Court's decision of these pure questions of federal law would be dependent, in any way, upon resolution of any factual disputes, and review by this Court accordingly is appropriate.

Moreover, respondent's repeated observation that the decision below was "unpublished" provides no basis for denying review. Indeed, "[n]onpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the [state courts] and surely is as important to the parties concerned as is a published opinion." *Smith* v. *United States*, 112 S. Ct. 667, 669 n.* (1991) (Blackmun, J., dissenting). Review by this Court is necessary in order to ensure that the Court of Appeal's errors are not repeated and that other municipal governments do not become subject to the unwarranted liabilities imposed upon the County in this case. *Cf. City of Canton* v. *Harris*, 489 U.S. 378 (1989) (reviewing unpublished order of Sixth Circuit regarding sweep of Section 1983 liability against municipality).

I.

A. The first question presented is whether the County's ordinarily lawful policy—which recognized self-help repossessions where the relevant party had waived his right to legal process—may give rise to Section 1983 liability where such a policy unforeseeably "conflicts" with respondent's "statutory right" to "procedures set forth in the Ship Mortgage Act." Pet. App. 23a; see *supra* p. 1 (quoting Pet. App. 18a). The County's liability was premised solely on the fact that the County's "policy," as applied in the exceptional circumstances of this case,

was contrary to the court's view of "plaintiff's federal statutory rights"—even though such "rights" had never been enumerated at the time the County acted. Pet. App. 23a; see Opp. 7 (liability based on application of general policy "without making any effort to comply with special federal rules applicable to the property at issue"). As explained in the Petition (Pet. 14-16), such an expansive theory of municipal liability has never been endorsed by this Court and is in fact inconsistent with principles of municipal liability embodied in the prior decisions of this Court and other federal courts.

Respondent offers numerous purported reasons to avoid this issue, none of which withstands serious scrutiny. First, respondent makes the remarkable argument that this federal question was not "timely and properly raised so as to give this Court jurisdiction to review" the state court judgment. Opp. 4-5 (quoting Sup. Ct. R. 14.1 (h)). The notion that a Section 1983 case against a municipality could be fully litigated without the issue of the County's liability under the "*Monell*" standard being raised is pure nonsense; in fact, the majority of the briefing in the courts below was devoted to the "*Monell* issue,"[1] and the issue was discussed at length in the Court of Appeal's opinion. Pet. App. 15a-18a. The jurisdictional requirement in question requires only that a federal claim must have been *either* raised in the state court *or* considered and resolved by the state court. See *Hill* v. *California*, 401 U.S. 797, 805 (1971). Where, as here, the highest state court to decide the case actually resolved the federal questions, there is no obstacle to this Court's review. See *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959).[2]

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[1] *See* Opening Brief of Appellant in the Court of Appeal 19-28; Reply Brief of Appellant 3-12; Supplemental Reply Brief of Appellant 2-6; Petition for Review in the California Supreme Court 12-20.

[2] The notion inherent in respondent's brief that petitioner is limited to the precise phrasing of an argument advanced below is flatly contrary to established precedent. *See Dewey* v. *Des Moines*,

Second, respondent engages in a lengthy and essentially circular dialectic about whether the County's liability was based upon the existence of its general policy or the absence of an exception to that policy (or the training of its Sheriff's Department officers pursuant to that policy or the exceptions thereto). Opp. 6-10. For purposes of this petition, however, it simply does not matter: petitioner, respondent and the court below all agree that "the Sheriff's Department had no specific policy regarding repossessions under preferred ship mortgages. Its policy was to treat all civil repossessions alike." *Id.* at 9; Pet. App. 18a. Thus, it was the County's general policy towards repossessions—and the failure of that policy to make specific provision for the Ship Mortgage Act—that allegedly "violated plaintiff's federal statutory rights." Pet. App. 23a, 18a. Semantics aside (see Opp. 8), the question is not how the County's policy is characterized but whether the imposition of liability under such a policy is consistent with *Monell*'s "fault-based analysis for imposing municipal liability." Pet. 10 (quoting *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985)).

Third, respondent asserts that the focus on the Ship Mortgage Act in the first question presented is misplaced because the "critical defect" in the County's policy was that "it violated due process." Opp. 11; see *id.* at 15 ("the salient norm here is due process, not the Ship Mortgage Act"). This argument flatly misrepresents the record: the *sole* basis for the judgment below was the court's conclusion that there was a violation of "plaintiff's federal statutory rights . . . contained within the Ship Mortgage Act of 1920." Pet. App. 18a. The procedural due process cases relied upon by respondent do

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173 U.S. 193, 198 (1899) (parties before Court "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972) (as long as federal question was properly raised or decided in state court, parties can use a different "method of analysis readily available to the state court").

not even appear in the decisions below, let alone provide any basis to support those judgments.[3]

Moreover, the statement that the County's policy would "obviously violate due process" rests solely on respondent's view of the "salient norm[s]" (Opp. 12, 15) and not on any decision of this Court. Respondent's analysis of the case law (Opp. 11-14) relies largely on cases where there has *not* been any waiver of pre-deprivation process, and the case on which respondent principally relies specifically distinguishes the situation of express contractual waiver. *Fuentes* v. *Shevin*, 407 U.S. 67, 94-96 (1972).[4] Indeed, respondent ultimately concedes that procedural due process rights can be the subject of a waiver (Opp. 13), reducing his argument to the factual assertion that the waiver *in this case* was invalid because it was "the product of extortion." *Id.* That argument (*id.* at 1, 11 n.7), however, rests only upon respondent's willingness to overlook the fact that the parties *stipulated* that "the facts of [the] invalidity were not apparent on the face of the document." Reporter's Transcript 53-54.

B. Once respondent's extravagant effort to avoid the question presented (Opp. 1-15) is put aside, respondent's

---

[3] Respondent's citation of seven references to "due process" or "constitutional rights" in the Court of Appeal's opinion is misleading. Opp. 14. Several of these references are no more than factual descriptions of the preferred ship mortgage that the Nicolettis showed to Lieutenant Baca (Pet. App. 10a-11a, 18a, 23a), and another describes the holding in *City of Canton* v. *Harris*, 489 U.S. 378 (1989) (Pet. App. 15a). In no instance did the court below suggest that this case was decided on constitutional due process grounds.

[4] In *Fuentes*, there was no "voluntar[y], intelligent[], and knowing[]" waiver on the face of the contract, which was a contract of adhesion including an ambiguous repossession provision printed in small type. 407 U.S. at 95 (quoting *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 187 (1972)). On its face, the waiver in this case much more nearly resembled the provision in *D.H. Overmyer Co.*, which the Court held could operate as a complete waiver of judicial process, subject only to collateral attack on fraud or similar grounds.

argument against review in this case—which amounts to nothing more than an assertion that the court below was correct—readily can be dismissed. For example, respondent asserts that requiring a finding of "deliberate indifference" would create a "sea of confusion" in the lower courts. *Id.* at 19-20. But that was precisely the standard adopted by this Court in *City of Canton*. As applied in this case, it would merely require a showing (as a basis for County liability) that the need for an "exception" to County policy (for preferred ship mortgages) was so obvious or frequently encountered that the municipality's failure to adopt an exception necessarily shows deliberate indifference to respondent's "rights."[5]

Indeed, the bankruptcy of respondent's "sea of confusion" argument is demonstrated by his suggestion that the facially invalid policy at issue in *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978), is comparable to the policy at issue here because even the *Monell* policy might not lead to "damage actions" in every case in which it was applied. Opp. 18 n.14.[6] There is an obvious difference in kind between the policy in *Monell*, which was generally unconstitutional but occasionally might fortuitously cause no harm, and the policy in this

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[5] Although respondent describes the County's characterization of *Merritt* v. *County of Los Angeles*, 875 F.2d 765 (9th Cir. 1989), as "misleading" (Opp. 17 n.12), he does not contest the fundamental point that the court in *Merritt* did precisely what the County believes should have been done here: it asked whether the County's failure to adopt an exception to its ordinarily lawful policy could be characterized as deliberately indifferent, and on finding that it could not, held in favor of the County as a matter of law.

[6] Respondent misunderstands the County's citation of *Owen* v. *City of Independence*, 445 U.S. 622 (1980), and *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), as additional cases in which the Court addressed a policy that "necessarily entailed a violation of federal rights in every situation to which it applied." Pet. 14. In both *Owen* and *Pembaur*, a *policymaker* had made a case-by-case decision, and the facts before the Court were therefore the only "situation to which [the decision] applied." Under such circumstances, there is obviously no question that the policymaker deliberately intended the policy to reach the relevant facts.

case, which was generally lawful and appropriate.[7] At bottom, all that respondent is able to suggest is that there may be cases in which the question of deliberate indifference is a close one, but that does not render the question presented unworthy of review.[8]

II.

The second question presented is whether the Ship Mortgage Act preempts state law in a fashion that confers upon respondent a federal right actionable under Section 1983. See Pet. i; *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 105-06 (1989). Once again, respondent relies upon his alternative "due process" argument, among others, to avoid addressing whether this issue is worthy of review. Opp. 20-21; see *supra* pp. 4-5.[9] Failing that, respondent simply argues that he is correct "on the merits." *Id.* at 21.[10] Respond-

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[7] The County does not maintain "that only policies unconstitutional in all their applications may give rise to Section 1983 liability." Opp. 19 n.14. Rather, the point is that policies that are *lawful* in *most* applications should not give rise to liability in the exceptional case absent deliberate indifference.

[8] There is no merit to respondent's suggestion that the Court of Appeal found in the alternative that the County was deliberately indifferent in this case. Opp. 20 n.15. In the passage quoted by respondent, the Court of Appeal was merely stating theories on which, if supported by the facts, liability might hypothetically be grounded, and not laying out the basis for any actual holding. *See* Pet. App. 17a-18a.

[9] Respondent's most remarkable argument is that certiorari should be denied on the ground that this case "would be a poor vehicle" for addressing the question presented because the preferred ship mortgage in question was invalid. Opp. 21. Respondent, of course, has had a verdict in excess of $9 million entered in his favor solely on the basis of his "rights" as a mortgagor under a preferred ship mortgage. To suggest that he should now escape review of that verdict on the ground that the mortgage was "not really such a mortgage at all" (*id.*) is an argument that should make respondent blush.

[10] Respondent rests primarily on the unsupported assertion that the Ship Mortgage Act was "not an effort to protect investors [but]

ent offers no legitimate suggestion why this Court should not review this question or, at the very least, withhold decision on the petition in order to determine if it is appropriate to vacate the judgment below and remand for further consideration in light of *Suter* v. *Artist M.*, No. 90-1488 (oral argument Dec. 2, 1991).

III.

The third question presented is whether the Ship Mortgage Act preempts state enforcement of contractual provisions for self-help foreclosure of preferred ship mortgages. Respondent again offers a number of arguments why this issue need not be reached. First, respondent points to the 1988 recodification of the Ship Mortgage Act to suggest that the decision below is lacking in precedential value. Opp. 23 n.16. However, none of the amendments that respondent cites in any way affected the Act's provision of an exclusive federal forum for judicial foreclosure of preferred ship mortgages—the sole basis of respondent's preemption argument. Second, respondent warns that reaching the preemption question will cause this Court to become embroiled in difficult questions of California law. *Id.* at 24-25. California law, however, has no bearing on this case. Section 1983 provides a remedy only for violations of *federal* rights; even if state law were to protect mortgagors from self-help repossession, such protection could not be the basis for a Section 1983 claim.

On the merits, respondent makes only a convoluted argument that preemption of self-help provisions is consistent with the Congressional purpose to protect mortgagees because one mortgagee's exercise of self-help may prejudice the interests of another creditor. *Id.* at 26-27.[11]

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primarily a move to benefit mortgagors." Opp. 22. This assertion is flatly contradicated by the holdings of this and other courts. *See* Pet. 21-22.

[11] In addition, respondent incorrectly asserts that the only case supporting petitioner's position is *Brown* v. *Baker*, 688 P.2d 943

Obviously, however, a dispute regarding the merits provides no reason to deny review in this Court when there is a conflict among State Supreme Courts on a basic issue of federal law. Moreover, there is no evidence that Congress intended through the Ship Mortgage Act to do more than ensure the availability to ship mortgagees of a uniform foreclosure procedure similar to that available to holders of secured interests in other property.[12]

* * * * *

No amount of revisionist argument on respondent's part can change the fact that the judgment below is premised on an extraordinarily expansive view of local government obligations under Section 1983. Because of the importance and recurring nature of the federal questions presented and because of the conflicts among the federal and state courts over the proper resolution of those questions, review by this Court clearly is warranted.

(Alaska 1984). Opp. 28. In fact, although *Brown* is the only State Supreme Court decision to have held that the Ship Mortgage Act does not preempt contractual self-help repossessions, at least two federal district courts have reached the same conclusion. *Dietrich* v. *Key Bank, N.A.*, 693 F. Supp. 1112, 1114-17 (S.D. Fla. 1988); *Price* v. *Seattle-First Nat'l Bank*, 582 F. Supp. 1568, 1569-70 (W.D. Wash. 1983); *see also Challenger, Inc.* v. *Durno*, 227 F.2d 918, 919 n.1, 922 (5th Cir. 1955) (assuming validity of contractual provision for self-help foreclosure as basis for decision). All three of these cases were cited at page 20, note 18 of the Petition for Certiorari, and these decisions, in addition to *Brown*, persuasively counterbalance the two decisions that, according to respondent, constitute the "weight of authority" in support of his position. Opp. 28. In any event, the conflict in itself warrants review by this Court.

[12] Respondent also asserts that the Ship Mortgage Act "expressly" preempts contractual self-help remedies, citing in support of this position only the disputed language conferring exclusive federal jurisdiction over *judicial* foreclosures. Opp. 26 n.20.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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